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THE LAW

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LANDLORD and TENANT

IN THE PROVINCE OF QUEBEC

(Exclusive of Farm Leases)

. . BY . .

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Editor Monthly Law Digest and Reporter; Assistant Editor Abbott's Railway Law; Collator of the Quebec Consolidated Digest [now in press].)

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To

ROBERT DAVIDSON McGIBBON, Esq., Q.C.

In admiration of his ability and qualities as an advocate ; and in acknowledgment of much kindness.

THIS WORK IS

(*with his permission*)

RESPECTFULLY DEDICATED

BY THE AUTHOR.

PREFACE.

The author believes there is some need in this Province of a manual which will deal, in convenient and easily accessible form, with the most important and practical questions relating to the law of landlord and tenant. It is now eleven years since Mr. Lorrain's excellent manual was published. A very considerable jurisprudence has accumulated during that period, which, it will be readily admitted, has thrown much light upon the articles of our Codes relating to the subject. In addition to our jurisprudence, a very careful selection has been made from some of the leading cases in Louisiana.

While this book must necessarily stand entirely on its merits, the author pleads as his justification for the compiling of legal works, the facilities afforded as a law librarian, and a knowledge of the law acquired through seven years of very close application to the study of its doctrine and jurisprudence. The firm of Messrs. McGibbon, Hogle & Mitchell, of this city, have very kindly read over and revised the manuscript.

F. L. S.

MONTREAL, OCTOBER 6, 1896.

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CONTRACT OF LEASE.

1. Definition of.

The lease of real estate is a contract by which one of the parties, the landlord, grants to the other, the tenant, the mere enjoyment of certain real estate during a certain time, for a rent or price which the latter obliges himself to pay. (1)

2. What Constitutes.

Although three things are requisite to form a valid contract of lease, viz. :—the consent of the parties, the object and the price, yet a valid contract can exist by presumption of law.

For instance, a lease is presumed by law to exist where the tenant is occupying the premises by the mere sufferance of the owner, whether express or implied. (2) Such a holding is regarded as an annual lease terminating on the first day of May of each year, in the case of urban property. It is also subject to tacit renewal and to all the rules of law applicable to leases. Persons so holding are liable to ejectment for non-payment of rent for a period exceeding three months, and for any other cause for which a lease may be rescinded. (3)

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(1) See Art. 1601 C. Code. The present treatise deals with lease of houses, warehouses, shops and manufactories, and not with the lease of farm and rural estates.

(2) Parent *v.* Oisel, S. C. 1883, 9 Q. L. R. 135, confirmed in Review.

(3) Art. 1608 C. Code.

A lease is presumed to result where a former lease for a definite period having expired, the tenant remains on the premises without opposition or notice from the landlord, more than eight days after the expiration of the lease. Such a lease is called a tacit renewal, the position and conduct of the parties being regarded as amounting to a consent to a new lease upon the same terms as the old one, excepting that, in regard to duration, the law presumes that the parties do not wish to bind themselves definitely for a longer period than one year. (1)

The law relating to promise of sale (2) is also in many respects applicable by analogy to promise of lease. (3) Therefore, a simple promise of lease made in writing by a landlord, but unaccepted by the tenant, is not a lease which can be enforced by the latter. (4) But where an agreement is drawn up and signed by the owner of property, authorizing the other party to the agreement to have a lease drawn up for such owner, and stating the rental, the number of the house and duration of the lease, such agreement is a complete contract of lease, the formal lease to be drawn up and signed later being merely intended to furnish evidence of the contract. (5) While a promise of lease accompanied by occupancy on the part of the tenant would probably constitute a binding lease, (6) yet, where the tenant remains in occupation of the premises after the cancellation of a former lease by insolvency, a new lease would not be constituted by a written promise on the part of the landlord to renew the old lease, where such promise was unaccepted by the tenant. (7)

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(1) Art. 1609 C. Code; see *infra* "Termination of the Lease—Tacit Renewal," Ch. VI. § 5, as to the nature of leases by tacit renewal.

(2) Arts. 1476-1478 C. Code.

(3) Poth. 390; 1 Duv. 43; Marc. C. N. Art. 1714 *et seq*; 1 Troplong 123; 25 Laurent 40 *et seq*. For a case involving the question whether a certain deed constituted a promise of sale or a lease, see Evans *v*. Champagne, C. R. 1895, 7 Que. 189.

(4) Art. 1476 C. Code; Loranger *v*. Clement, C. R. 1878, 1 L. N. 326.

(5) Phelan *v*. Turner, C. R. 1895, 7 Que. 487; 1 Guillouard No. 41.

(6) See Art. 1478 C. Code.

(7) Loranger *v*. Clement, C. R. 1878, 1 L. N. 326.

3. Emphyteutic Lease.

Although it is not intended to treat in this work of emphyteusis, yet as it is sometimes difficult to distinguish when a lease is emphyteutic or not, it will be necessary to point out the chief grounds of distinction.

Emphyteusis, or emphyteutic lease, is a contract by which the proprietor of an immoveable *conveys* it for a time to another, the tenant subjecting himself to *make improvements*, to pay the landlord an annual rent, and to such other charges as may be agreed upon. (1)

The duration of emphyteusis cannot exceed ninety-nine years and must be for more than nine. (2) Therefore, if a lease be for a period of more than nine years, in order to determine whether it be emphyteutic or not, the principal test will be—does it contain a stipulation obliging the tenant to improve the property leased? If it does not the probability will be that the lease will not be regarded as an emphyteusis, although there may be some other clauses therein that might lend some color to an opposite interpretation. (3) If it does contain such a stipulation the lease will be regarded as an emphyteusis, although it be drawn up in such a way as to give it the appearance of an ordinary lease for a long period. (4)

The emphyteutic lease carries with it alienation; so long as it lasts, the tenant enjoys all the rights attached to the quality of a proprietor. (5).

The rights and obligations of the landlord and the tenant

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(1) Art. 567 C. Code.

(2) Art. 568 *ib.*

(3) Credit Foncier Franco-Canadien *v.* Young, S. C. 1889, 9 Q. L. R. 317. Provided always that the lease has been made since the Code.

(4) Fraser *v.* Brunette, Q. B. 1890, 19 R. L. 306; Poitras *v.* Berger, Q. B. 1879, 10 R L. 214; Lepine *v.* Bldg. Society, Q. B. 1876, 20 L. C. J. 300. But see G. N. W. Tel. Co. *v.* Montreal Tel. Co., M. L. R. 6 Q. B. 257, as to lease of telegraph system for 97 years; and Marret *v.* Robitaille, 9 R. L. 420.
It is to be noted that in Lepine *v.* Bldg. Society the lease with promise of sale stipulated for improvements.

(5) Art. 569 C. Code.

under an emphyteutic lease are governed by special rules (1), and actions between the parties are not subject to the summary procedure provided by Art. 887 *et seq.* C. C. P. (2); nor has the landlord the privilege for the payment of rent which he has under an ordinary lease. (3)

4. Form of Contract of Lease.

A lease may be either verbal (4) or presumed, (5) notarial or by private writing.

5. Proof of.

The general rules of evidence are applicable in matters of lease.

A notarial lease makes complete proof in itself as to its contents, (6) and can only be set aside on grounds of its falsity. (7)

A lease by private writing acknowledged by the party against whom it is set up, or legally held to be acknowledged or proved, has the same effect in making proof between the parties thereto as a notarial lease. (8)

Testimony cannot in any case, be received to contradict or vary the terms of a valid written instrument, (9) but if such evidence is admitted without objection at the trial, it

(1) Arts. 573 to 578 C. Code.

(2) Lepine *v.* Bldg. Society, Q. B. 1876, 20 L. C. J. 300.

(3) Elliot *v.* Eastern Townships Bank, Q. B. 1882, 2 Dorion, Q. B. 172.

(4) Art. 1657 C. Code.

(5) Arts. 1608-1609 C. Code.

(6) Art. 1207 C. Code.

(7) Art. 1211 C. Code.

(8) Art. 1222 C. Code.

(9) Art. 1234, C. Code.

The Supreme Court in Bury *v.* Murray, 1894, 24 Can. S. C. R., 77, has adopted the opinion laid down by Mr. Langelier in his work on Evidence, viz:—that not even a commencement of proof in writing (provided it does not amount to a full admission) will serve to contradict or vary the terms of a valid written instrument (see discussion on this question in vol 1, Revue Legale [new series], pp. 166, 355, 435); but it may be noted that the Supreme Court had adopted a contrary view on a former occasion (Lamoureux *v.* Molleur, Supreme Court, 8th March, 1886, Cassel's Dig. *2nd* Edit. p. 74) apparently overlooked in Bury *v.* Murray.

cannot subsequently be set aside in a Court of Appeal. (1) Under a notarial lease with clause prohibiting the subletting of the premises without the landlord's consent, nothing short of a commencement of proof in writing will avail to determine whether the landlord had permitted the tenant to sublet. (2) However, in an action for rent due under a notarial lease, the tenant can plead that he had not obtained possession of the premises leased, at the period stated in the lease, and that in consequence he has suffered damages which should be deducted from the rent due his landlord. (3)

A verbal lease can only be proved by testimony where the price is less than $50, unless there is some writing in connection therewith which may serve as a commencement of proof, or unless its existence is admitted by the adverse party when examined under oath or interrogated on articulated facts. (4)

In the case of a person occupying by sufferance of the owner, under Art. 1608 C. Code, proof may be made by testimony of the value of the lease, irrespective of the amount involved. (5)

Where the landlord alleges in his action a verbal lease, and also use and occupation of the premises by the tenant sued, he can, if he fail to prove the verbal lease, recover the value of the use and occupation. (6) If, however, the tenant, in an action against him by the landlord on a verbal lease, admits in his plea, or otherwise, the existence of a verbal lease and occupation, the landlord can prove by witnesses the value and duration of the occupation. (7) And in an action on

(1) Schwersenski *v.* Vineberg, Supreme Court, 19 Can. S. C. R. 243.

(2) Foley *v.* Charles, 15 L. C. R. 248, in the Superior Court; and see Anderson *v.* Baths Q. B., 1888, 15 Q. L. R., 196.

(3) Belleau *v.* Regina, 12 L. C. R. 40.

(4) Arts. 1233-1246 C. Code.

(5) Art. 1233 C. Code.

(6) Hanover *v.* Wilke, Q. B. 1855, 1 L. C. J. 37. Art. 1223 C. Code.

(7) Viger *v.* Beliveau, Q. B. 1863, 7 L. C. J. 199.

a verbal lease, an admission by one of the parties before witnesses of the existence of the lease, the evidence of such witnesses not being objected to by him at the trial and its rejection not being demanded at the hearing, will be sufficient to let in proof by testimony in favor of the other party to the lease. (1) A defendant, who in answer to an action on a verbal lease, pleads a claim for damages as set off, admits the existence of the lease. (2)

Testimony given by one of the parties to the lease cannot avail in his favor. (3).

The notary before whom a lease is passed cannot be examined to ascertain what passed between the parties thereto, nor to vary or contradict it in any way. (4)

6. Duration of.

According to article 1601 C. Code, a lease may be for a *certain time*, which allows the parties to the lease to stipulate for a period, however restricted or extended. But there is this limitation: the duration of the lease must not extend beyond ninety-nine years, or the lives of three persons consecutively. (5)

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(1) Saunders *v.* Déom, C. R. 1871, 15 L. C. J. 265.

(2) Walsh *v.* Howard, Q. B. 1886, 12 Q. L. R. 295.

(3) Art. 1232 C. Code.

(4) Lemoine *v.* de Bellefeuille, S. C. 1882, 5 L. N. 426; Dubuc *v.* Kidson, Supreme Court, 23 June, 1884. Cassel's Dig. 2*nd* Edit. p. 782. But in Ritchie *v.* Wragg, the evidence of an advocate in whose office the lease was passed, was held admissible to prove whether the landlord had knowledge or not that the house leased was to be used for immoral purposes (Q. B. 1865, 1 L. C. L. J. 59). And see Clarke *v.* Clarke S. C., 1851, 2 L. C. R. 11.

(5) If an emphyteutic lease cannot exceed ninety-nine years (Art. 568 C. Code), *à fortiori* an ordinary lease of real estate cannot exceed that period (3 Mourlon 733; 1 Troplong, *Louage*, 27; 25 Laurent 38). Article 389 C. Code provides that "No ground rent or other rent, affecting real estate, can be created for a period exceeding ninety-nine years, or the lives of three persons consecutively." The argument from this is irresistible that, where a lease of real estate exceeds ninety-nine years, and is registered (see Art. 2128), it becomes, as the codifiers have declared it to be (vol. 3, p. 64, Cod. Rep. and see Dupuy *v.* Bourdeau, S. C. 1881, 6 L. N. 12), "a charge on the immoveable leased, like any other charge," and therefore assimilable to rents under Art. 389 C. Code. The Code expressly provides (Arts. 1593, 1594 and 389 C. Code) that the alienation of real property for an annual rent cannot exceed the

Where there is occupancy of the premises by the mere sufferance of the owner, this holding is regarded as an annual lease terminating on the first day of May of each year if the property be a house. (1)

When the lease of a house omits to specify the time for its duration, it is held to be annual, terminating on the first day of May of each year, when the rent is at so much a year; for a month, when it is at so much a month; for a day when it is at so much a day. If the rate of the rent for a certain time be not shown, the duration of the lease is regulated by the usage of the place. (2)

7. Capacity to Make.

The capacity to enter into a contract of lease or hire is governed by the general rules relating to capacity to contract. (3) All persons are capable of contracting, except those whose incapacity is expressly declared by law. (4)

Those legally incapable of contracting are:

1. Minors in the cases and according to the provisions contained in the Civil Code;

2. Married women, except in the cases specified by law;

3. Those who, by special provisions of law, are prohibited from contracting by reason of their relation to each other, or of the object of the contract;

4. Persons insane or suffering a temporary derangement of intellect arising from disease, accident, drunkenness or

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period of ninety-nine years or the lives of three persons consecutively; such an alienation is regarded as equivalent to a sale, and it is incontestable that a registered lease in excess of that period, if not regarded as a sale, would be very effective in tying-up the property leased for a long period. This result would be directly in opposition to one of the fundamental principles of our law (see Art. 932 C. Code "Substitutions created by will or by gifts *inter vivos* cannot be extended to more than two degrees, exclusive of the institute.")

(1) Art. 1608 C. Code.

(2) Art. 1642 C. Code; see chapter VI "Termination of the lease — Notice to quit"

(3) Art. 1604 C. Code.

(4) Art. 985 C. Code.

other causes, or who by reason of weakness of understanding are unable to give a valid consent;

5. Persons civilly dead. (1)

The incapacity of minors and of persons interdicted for prodigality, is established in their favor. Parties capable of contracting cannot set up the incapacity of the minors or of the interdicted persons with whom they have contracted. (2)

A lease for a period exceeding nine years is considered as a species of alienation, consequently, all those who by law have merely the right to administer their property, cannot pass a lease for more than that period. But a lease for less than that period is an act of simple administration, consequently, all those who have simply the administration of their property, or the property of others, can lease it for a period of less than nine years, although they cannot alienate it. (3) Trustees cannot evade the law by creating leases for nine years, with a stipulation that the tenant shall have a renewal on certain conditions for nine years longer; such leases are in effect, leases for eighteen years, and *ultra vires*. 4)

An emancipated minor may without assistance grant leases for terms not exceeding nine years; (5) he may also hire a house, and the contract will not be reduced unless the price is excessive, the courts taking into consideration the fortune of the minor, the good or bad faith of the persons who have contracted with him, or the utility or inutility of the expenditure. (6)

A minor engaged in trade is reputed of full age for all acts relating to such trade. (7) Therefore, when a minor leases a

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(1) Art. 986 C. Code.

(2) Art. 987 C. Code.

(3) 1 Guillouard p. 56; Pothier, *Louage*, Nos. 4 and 5. Arts. 322, 319, 568 C. Code; 5 Laurent, p. 456.

(4) President et Syndics, etc., de Laprairie *v.* Bissonnette, C. R. 1888; M. L. R. 4 S. C. 414.

(5) Art. 319 C. Code.

(6) Art. 322; 1 Troplong 147.

(7) Art. 323.

shop for the purpose of carrying on his trade as barber therein, he will, in that case, be regarded as an adult, and can be sued for rental of the premises. (1)

A person to whom a judicial adviser has been appointed, can also pass leases not exceeding nine years, unless the judgment appointing the judicial adviser has specially delegated to him the leasing of such person's property. (2)

A married woman, separate as to property, whether such separation exist by virtue of a marriage contract or by judicial decree, has a right to administer her property ; she can, therefore, pass a lease for a period not exceeding nine years without the authorization of her husband, (3) and can also hire a house under the same conditions. (4)

But a married woman not separate as to property—whether there be community or exclusion of community—cannot bind herself by lease without authorization, the administration of her property being with her husband. (5) If, however, her husband is absent, or in other exceptional cases, (6) a married woman may take the lease of a house as a habitation for herself and family, the rental of which must be proportionate to her means and station. (7) The administration of

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(1) Vogel *v.* Pelletier, Mag. Ct. 1889, 13 L. N. 107.

(2) Art. 351 C. Code. 1 Troplong 148; 2 Touillier N. 1378; 3 Duranton 799; 8 Demolombe 743; 1 Aubry & Rau, § 140, p. 572; 5 Laurent 370; 1 Guillouard 58; Cass. 14 July, 1875; S. 75-1-463

(3) C. Code, Arts. 177, 1318; 1 Guillouard 59; 17 Duranton 33; 3 Duvergier 37; 1 Troplong 149; 3 Mourlon 196;

(4) 1 Troplong 149. Where a property is occupied by a husband (whose wife is separate as to property) by the tolerance of the owner, in the absence of a special agreement, the wife cannot be held responsible for rent of the property occupied by the family during the insolvency of the husband (Harwood *v.* Fowler, C. R. 1889; M. L. R., 7 S. C. 363; and see Bordeaux, 22 June, 1849; J. P. 1851, Vol. 2, p 466.

(5) Arts. 1292, 1416, C. Code; 2 Bourjon, lib. 4, tit. 4, ch. 1, sec. 1, No. 3. If in a notarial lease a married woman qualifies herself as separate as to property, she can nevertheless, when sued in the lease, plead that she is common as to property. O'Connor *v* Inglis Q. B: 1891, 21 R. L. 315; 1 Troplong 149.

(6) Short *v.* Kelly, S. C. 1879; 2 L. N. 284.

(7) 1 Guillouard 59; 1 Troplong 149.

the wife's personal property being with the husband (1) in the case we are treating of, it follows that even he cannot alone pass a lease of such property for a period longer than nine years, (2) for the law considers such leases to be a species of alienation of the property.

But leases made by the husband alone of his wife's property, which exceed nine years, are not void; on the contrary, so long as the community exists, the lease in excess of nine years will be allowed to run its full length; but if the community cease to exist during the period of such overtime lease, whether by the death of the husband or the separation of property of the wife, then she can demand the reduction of the lease to the period allowed by law. The tenant cannot demand the reduction; the right exists only in favor of the wife or her heirs. (3) Leases of property of the wife, for nine years or a shorter term, which have been made or renewed by the husband alone more than a year in advance of the expiration of the pending lease, do not bind the wife, unless they come into operation before the dissolution of the community, (4) and the same applies to such leases made by the husband in fraud of the wife's rights. (5)

What has been said above as to leases by a husband of the property of his wife, of which he has the administration, is applicable to leases made by all persons who have the administration of the property of others. (6) For instance, leases of a minor's property for more than nine years, passed by his tutor, are not binding on the minor after the cessation of the curatorship; those for less than nine years, which have

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(1) Art. 1298 C. Code.

(2) Art. 1299 C. Code.

(3) Art. 1299 C. Code; 2 Bourgon, lib. 4, tit. 4, ch. 1, sec. 1, Nos. 8 and 9; Ferrière, Cout. de Paris, Art. 227; Guyot *vo.* Mari, p. 332.

(4) 1300 C. Code.

(5) Pothier, *Puissance Maritale*, 92 to 95; 1 Troplong 151 *et seq.*

(6) Bourjon, vol. 2, p. 37, 4 *et seq;* 4 Pothier, No. 44; 3 Duvergier 39, 40, 41; 1 Troplong 149 *et seq;* Agnel, 27; 1 Mourlon 421; 3 Mourlon 148, 149; 25 Laurent 47 *et seq;* 1 Guillouard, p. 58.

been made or renewed by the curator in anticipation, do not bind the minor unless they come into operation before the expiration of the tutorship. (1) And so in the case of leases made by curators to interdicted persons (2) and to vacant successions; (3) by those put in provisional possession of an absentee's estate ; (4) by beneficiary heirs. (5)

A married woman, who has been either expressly or impliedly authorized to become a public trader, may, without the authorization of her husband, obligate herself for all that relates to her commerce, and in such case she also binds her husband, if there be community between them ; she can therefore validly hire a shop or premises for the purpose of carrying on her business therein. (6)

The usufructuary may lease his right of usufruct, but the lease expires with his usufruct ; nevertheless, the tenant has a right, and may be compelled to continue his enjoyment during the rest of the year which had begun before the usufruct expired, subject to the payment of the rent to the proprietor. (7) And the foregoing is also applicable to dowagers. (8)

The relation of landlord and tenant can arise between the usufructuary and a person holding real property by his sufferance, the word "owner" in Art. 1608 of the Civil Code being interpreted as the person who has the right to the use of the property. (9)

Where a person leases property of which he is not the

(1) 1 Guillouard, p. 58.

(2) Art. 343 Civ. Code.

(3) Arts. 90, 91 Civ. Code.

(4) Art. 96 C. Code.

(5) Art. 672.

(6) Art. 179 C. Code. Where an action was taken by a wife on lease of property belonging to her, but the lease proved to be made in the name of the husband ;—*Held*, good. Mathewson *v.* Fletcher, S.C. 1882, 5 L. N. 131.

(7) Art. 457, and see Labelle *v.* Villeneuve, C. Ct. 1872, 28 L. C. J. 254.

(8) Art. 1457 C. Code.

(9) Letang *v.* Donohue, S.C. 1895, 8 Que. 497 ; this case is now in Review.

owner and in which he has no right, but of which he has the apparent possession, to a party in good faith, the lease is valid, at least to this extent: that the landlord is bound to warrant the tenant in his possession, or in the event of his eviction by the real owner, to indemnify him for the damages thereby suffered, and so long as the tenant is in undisturbed possession, he is bound to pay the rental to the person with whom he made the lease. (1)

One of the joint owners of an undivided property cannot lease it, nor even his share of it, without the consent of the other joint owners. (2) If he should lease such property, the other joint owners could demand the cancellation of the lease, but the tenant could demand damages against the joint owner who leased to him. (3) But on the principle stated in the preceding paragraph, the lease could only be cancelled upon action taken to that effect by the other joint owners; so long as they did not interfere, the lease would be valid. (4)

Things sequestered cannot be leased directly or indirectly to any of the parties in the contest concerning it. (5)

Although contracts between husband and wife after mar-

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(1) Poitras *v.* Berger, Q. B. 1879, 2 L. N. 390, 10 R. L. 214; Pothier, No. 20; Merlin, *vo.* Bail § 2, No. 7; Agnel, No. 47; Domat, *Louage*, sec. 1, No. 6; 1 Guillouard, pp. 65, 66; Art. 2682 C. Code Louisiana; Hullet *v.* Wright, K. B. 1817, 2 R. de L. 59.

Mr. Troplong (*Louage*, No. 98 *et seq.*) goes still further, and holds that in such case the tenant cannot be evicted by the real owner, even where the lease is for more than nine years, but the contrary has been held in our courts in Desautels *v.* Parker, S. C. 1894, 6 Que. 419, confirmed in Review (unanimously), 9 Feb., 1895. See under chapter "Termination of the lease—Eviction of the landlord," *infra*, ch. VI, § 6.

A person who obtains a *conditional* promise of sale followed by possession, and who has not complied with the conditions before the time fixed by the contract, ceases to have any right in the property, and is therefore unable to give a tenant any right therein as against the real owner. Desautels *v.* Parker, S. C. 1894, 6 Que. 419.

(2) Stearns *v.* Ross, Q. B. 1885, M. L. R., 2 Q. B. 379; confirming S. C., M. L. R., 1 S. C. 448.

(3) 1 Guillouard 54; 2 Bourjon, lib. 4, tit. 4, ch. 1, sec. 3; 17 Dur. 35; 3 Duv. 87; 1 Troplong 100; 25 Laurent 44.

(4) 1 Guillouard 54, and see 1 Troplong 100; *Contra* 25 Laurent 44.

(5) Art. 1826 C. Code.

riage are rarely valid, (1) yet a husband can lease property to his wife in payment of her claim upon the community property, arising out of a judicial separation of property. (2)

There are other instances where the law, though not affecting the party's capacity to contract, yet requires the fulfilment of certain formalities on his part before he can give a valid lease of property. Thus a person who holds real property under a promise of sale cannot validly lease the same until his title has been registered and the tax under 55 and 56 Vic., ch. 17, on transfers of real estate has been paid. (3)

8. For Immoral Purposes.

It is the policy of our law not to uphold a contract the consideration for which is unlawful; (4) and the consideration is unlawful when it is prohibited by law, or is contrary to good morals or public order. (5) Therefore, where a house is leased expressly for the purpose of prostitution, the landlord cannot recover rent therefor. (6) In one curious case in this Province, it was sought to impute to the landlord knowledge of the purpose for which the premises were leased, because the tenant's wife told him, at the time the lease was made, that it was necessary to have twelve bedrooms; but the Court did not consider that in itself was evidence that the house was to be used for immoral purposes. (7) It has been recently held by our Court of Appeal (8) that in an action by a landlord to have the lease of a house resiliated on the

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(1) Art. 1265 C. Code; Art. 1483 C. Code.

(2) Deslauriers *v.* Bourque, Q. B. 1870, 15 L. C. J. 72.

(3) Desautels *v.* Parker, S. C. 1894, 6 Que. 419, confirmed in Review 9th Feb., 1895.

(4) Art. 989 C. Code.

(5) Art. 990 C. Code.

(6) Garish *v.* Duval, S. C. 1854, 7 L. C. J. 127; Harris *v.* Fontaine, C. Ct. 1869, 13 L. C. J. 336.

(7) Ritchie *v.* Wragg, Q. B. 1865, 1 L. C. L. J. 59.

(8) Menard *v.* Bryson, Q. B. 1892, 1 Que. 154.

ground that it was used for immoral purposes, the tenant might prove that the landlord himself leased some of his rooms to prostitutes, and this being done, the action was dismissed. But, in an earlier case, (1) decided by the Court of Appeal, Duval, Chief Justice, remarked that he would hesitate before he allowed a person to plead his own infamy, for *Pothier* (2) said it was no answer to the action. And these views of the Chief Justice had been sustained in a case decided only the year before. (3) It may be said, in addition, that it is an offence under the Montreal city by-laws for a proprietor or usufructuary to knowingly lease premises for purposes of prostitution. The penalty for such offence is a fine not exceeding $200, or imprisonment not exceeding six months.

9. The Price or Rent.

The price or rent is essential to the contract of lease and hire. (4) If premises were leased to a tenant without any stipulation as to rent, this would amount to a mere loan for use (*commodatum*). (5) But where a person holds real property by the sufferance of the owner, without lease, the law presumes a lease, and therefore requires the occupant to pay the annual value of the property. (6)

The rent usually consists of a sum of money. If otherwise, such as by personal services rendered, the contract, though not strictly speaking one of lease, is so closely assimilated thereto as to render applicable the law of landlord and tenant. For instance, where a gardener was engaged at $30 per month, with the right of occupying a tenement free from rent as long as he should continue to hold the situation, on condition that

(1) Ritchie *v.* Wragg, Q. B. 1865, 1 L. C. L. J. 59.
(2) Nos. 24, 25.
(3) Guy *v.* Goudreault, S. C. 1864, 14 L. C. R. 225.
(4) 1 Guillouard 62; Poth. 32; 3 Duv. 93]; 1 Troplong 3.
(5) And therefore governed by Art. 1763 *et seq.* C. C.
(6) Art. 1608 C. Code.

he should be subject to dismissal at a month's notice to quit, it was held by the Court that the relation of lessor and lessee existed so as to bring the parties within the scope of the Lessors' and Lessees' Act for the purposes of ejectment. (1) And again, where the owner of property permits another to occupy the premises in consideration of his guardianship, and to manage the mills thereon, and lodge the owner and his family from time to time, this is a contract which, although not strictly a lease, sufficiently resembles one to render applicable thereto the laws of landlord and tenant, and the tenant would be entitled to a three months' notice to quit the premises before being evicted therefrom. (2)

The price or rent (which must be agreed upon) (3) must also be an actual one, and not fictitious; if it were otherwise, or if it were agreed that the landlord should remit the rent, the contract would only be one of loan for use, and governed by the laws appertaining thereto. (4) But once the price is an actual one, it is of not much account that it is shown to be insignificant, viewed in its relation to the property leased. This would certainly not be ground for revocation of the lease in favor of the landlord, nor would it avail the creditors, hypothecary or otherwise, to that end. Actual fraud must be *proved* in such case, in order that the lease may be vitiated. (5)

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(1) Hart *v.* O'Brien, C. R. 1866, 2 L. C. L. J. 187; Pothier No. 38; 1 Guillouard 62.

(2) Brunet *v.* Berthiaume, S. C. 1892, 2 Que. 416. Dismissal from service without notice does not terminate lease of house. Notice required. Reid *v.* Smith, C. R. 1872, 6 Q. L. R. 367.

(3) 1 Guillouard 65.

(4) 4 Pothier 33 to 36; 1 Troplong No. 3; 3 Duvergier No. 101; 1 Guillouard 63.

(5) 1 Guillouard 64.

CHAPTER II.

OBLIGATIONS OF THE LANDLORD.

1. *To deliver the premises leased.*
2. *To maintain the premises in a fit condition for the use for which they were leased.*
3. *To warrant the tenant against all defects and faults.*
4. *To warrant the tenant against disturbance.*
   (1st.) Disturbance by the landlord himself.
   (2nd.) Disturbance by the Government, whether municipal or parliamentary.
   (3rd.) Disturbance by third parties—Trespass.
   (4th.) Disturbance caused by co-tenants.
   (5th.) Judicial disturbance.
   (6th.) Damage caused by neighboring proprietor.

1. To deliver the premises leased.

The landlord is obliged to deliver the building leased (1) with all the accessories (2) naturally belonging to it; and if these are not stated in the lease, they must be determined by usage. (3) The use of a common yard in the rear of a house must be regarded as being always accessible to the tenant whether by foot or by vehicle. (4) A machine shop or manufacturing establishment, if leased as such, must be delivered over with all its accessories adapted to and necessary for the

(1) Art. 1612 C. Code.

(2) Art. 1499 C. Code.

(3) Dalloz, 1856-2-75 and Note.

(4) *ib*:— And see Ritchie *v.* Walcott, S. C. 1889, 15 Q. L. R. at p. 166. A tenant, like the owner of enclaved property, has a right of way of ingress and egress to and from the spot leased.

An injunction does not lie to prevent the tenant from using a wagon for the conveyance of his goods and effects, where it is shown that such use is almost indispensable and does not prove injurious to the landlord or of others having a right otherwise to complain.

The case would be different should the tenant misuse or abuse the privilege. New Orleans City Ry. Co. *v.* McCloskey, Supreme Ct. Louisiana 1883, 35 La. Ann. 786.

carrying on of the particular enterprise for which it is leased. (1) Where a tenant leased buildings in course of construction, and on taking possession of the same also occupied and used, without objection on the part of the landlord, during nearly four years, a small shed in the rear of the leased premises, the shed, though not mentioned in the lease, nor shown on the architect's plans of the buildings, was considered by the court as an accessory of the premises leased; and that the landlord, by acquiescing for so long a period in the tenant's occupation without claiming rent, had placed that construction upon the contract. (2)

As already remarked, (3) the law relating to sale is also applicable by analogy, in many cases, to lease; (4) therefore, unless the lease contains stipulations to the contrary, moveable things which a proprietor has placed on his real property for a permanency, or which he has incorporated therewith, are immoveable by their destination as long as they remain there, and go with the premises. Thus, within these restrictions, the following and other like objects are immoveable: (5)

1. Presses, boilers, stills, vats and tuns;

2. All utensils necessary for working forges, paper-mills and other manufactories.

Those things are considered as being attached for a permanency which are placed by the proprietor and fastened with iron and nails, imbedded in plaster, lime or cement, or which cannot be removed without breakage, or without destroying or deteriorating that part of the property to which they are attached. Mirrors, pictures and other ornaments are considered to have been placed permanently when with-

(1) 1 Troplong 160; 25 Laurent 104; 4 Pothier, No. 54; 1 Guillouard 88.
(2) Myler *v.* Styles, Q. B. 1888, M. L. R., 4 Q. B. 113.
(3) *Supra* p 2.
(4) And see Art. 1599 C. Code.
(5) Art. 379 C. Code.

out them the part of the room they cover would remain incomplete or imperfect. (1)

And not only must the premises be delivered over to the tenant with all the accessories which exist at the moment of delivery, but those which are wanting and which the law requires should be extant, must be supplied. (2) Therefore, a dwelling house delivered without a privy, especially where its absence would be a contravention of the city's by-laws, will be a ground for cancellation of the lease. (3) But in regard to other accessories, the absence of which would not render the premises unfit for occupation, the continued occupancy by the tenant without complaint would be equivalent to his acquiescence in the existing state of affairs. (4)

Although the Code declares that the landlord is not obliged to warrant the tenant against disturbance by the mere trespass of a third party, (5) this only applies during the course of the lease, and not to what occurs prior thereto; nor is there any distinction in this respect between disturbance by mere trespass and disturbance in consequence of a claim concerning the right of the property, or other right in and upon the thing leased. (6) The landlord is obliged, says the Code, (7) to deliver to the lessee the thing leased, and where any disturbance of a third person results which

(1) Art. 380 C. Code.

(2) Art. 1614 C. Code states that "The lessor is obliged to warrant the lessee against all *defects* and faults in the thing leased, which *prevent* or *diminish* its use, whether known to the lessor or not." And by Art. 1612: "to maintain the thing in a fit condition for the use for which it has been leased." And see 1 Guillouard 88; Sirey 76-2-40.

(3) Lambert *v.* Laframboise, C. Ct. 1860, 11 L. C. R. 16; Beaudry *v.* Lupien, Q. B. 1881, Mont., Sept. 23.

(4) Cassation, Sirey, 58-1-728; 1 Guillouard 94; and see Peatman *v.* Lapierre, S. C. 1889, 18 R. L. 35; Masson *v.* Masson, S. C. 1894, 7 Que. 5.

(5) Art. 1616 Civ. Code.

(6) Art. 1618, which only applies after delivery of the premises.

(7) Art. 1612.

prevents the tenant's occupation of the premises, the landlord will have defaulted in his obligation. (1)

The premises must be delivered in a good state of repair in all respects, (2) and, whereas, during the pendency of the lease, two kinds of repairs are distinguished by the Code, (3) this distinction does not exist at the moment of entering into possession by the tenant, for the premises, in the language of the Code, " must be delivered in a good state of repairs *in all respects*." (4) This phrase must be held to include the sanitary condition of the premises, irrespective of the construction of the house. For instance, a tenant is not obliged to enter into possession of premises which have just been occupied by a person suffering from a virulent infectious disease, such as typhoid fever, where the landlord refuses to have the premises properly disinfected. (5) The tenant would, doubtless, be equally justified in such a course, were the house to be infested with vermin to such an extent as to render the premises uninhabitable to cleanly people. (6) The phrase would necessarily include the unsanitary condition of the premises arising from a defective construction of the drainage. Thus, where, on the day before entering the premises, the sanitary inspector had reported that they were not in good sanitary condition, it was held that the tenant was not bound to receive them under the agreement. (7)

It is quite lawful for the parties to the lease to stipulate therein that any repairs which the premises might need at the date of delivery shall be made by the tenant, (8) although even such a stipulation would not absolve the landlord from

(1) Cassation, Sirey 37-1-970; 3 Duvergier 277; 1 Troplong 262; 4 Aubry & Rau, pp. 473-474; 25 Laurent 105; 1 Guillouard 89.

(2) Art. 1613 C. Code.

(3) *Ib.*;—and Art. 1635.

(4) 1 Guillouard 93; 3 Duvergier 278; 25 Laurent 107; 1 Troplong 164.

(5) Laurier *v.* Turcotte, C. R. 1896, 9 Que. 86.

(6) Bordeaux, 29 May, 1879, Sirey, 80-2-4.

(7) Shuter *v.* Saunders, S. C. 1880, 3 L. N. 134.

(8) Hudon *v.* Plimsoll, C. Ct. 1886, 9 L. N. 322; Deault *v.* Ledoux, C. R. 1894, 5 Que. 293.

his obligation where the premises become totally uninhabitable owing to their *unsanitary* condition, (1) nor where it is a question rather of constructing a new roof than of repairing an old one. (2)

Unless the lease contains such a stipulation, nothing short of occupation of the premises by the tenant, with knowledge of the defects for a certain period, without complaining, will absolve the landlord from the obligation of delivering them in a good condition *in all respects*. (3) The mere entering into possession will not be construed into acquiescence, on the part of the tenant. (4) But if the defects have been known to him, a very short period of occupancy will be construed into acquiescence, provided always, as stated above, that such defects do not radically affect the habitability of the premises. (5)

If the landlord refuse to deliver the premises leased by him and it be in his power to do so, he can either be compelled by the tenant to specifically perform his contract, (6) or to have the lease cancelled. (7) If specific performance is required by the tenant, and the landlord who occupies the premises himself refuses to comply, the Court will order him, within three clear days' delay, to vacate the premises, in default of which his household effects will be ejected therefrom and the plaintiff put in possession by the officers of the Court. (8)

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(1) Bagg *v.* Duchesneau, C. R. 1892, 2 Que. 350.

(2) Koss *v.* Stearns, S.C. 1885; M. L. R., 1 S. C. 448, confirmed in appeal, M. L. R., 2 Q. B. 379; and see Brown *v.* Lighthall, C. Ct. 1888, 15 R. L. 694; Deault *v.* Ledoux, C. R. 1894, 5 Que. 293.

(3) 1 Guillouard 94. Cassation, Sirey 58-1-728; Ballantine *v.* Snowdon, Q.B. Montreal, June, 1894.

(4) 1 Guillouard 94; Caen, 30 Aug., 1862, *Rec. de Caen*, 63, p. 58; 17 Duranton No. 61; 3 Duvergier, No. 278; Troplong, No. 164 *et seq.*

(5) *Ib.*

(6) Art. 1065 C. Code; 1 Guillouard 95.

(7) Evans *v.* Moore, Q. B. 1888, 16 R. L. 668; Riopel *v.* St. Amour, C. R. 1892, 1 Que. 238.

(8) Morgan *v.* Dubois, C. R. 1888, 32 L. C. J. 204; Jaeger *v.* Sauvé, S. C. 1878, 1 L. N. 139.

If the premises are not ready for occupation at the time stipulated, the tenant is justified in refusing to take possession, and is not liable for rent under the contract, although the house was in course of construction when the lease was made. (1) And to his principal action the tenant can join a demand of damages, or he may sue in damages only. (2).

The landlord would not be held liable for failure to deliver, where such failure is caused by a fortuitous event or by irresistible force, without any fault on his part, unless he has specially obliged himself by the terms of the contract. (3) But where the landlord fails to deliver the premises through his fault, proximate or remote, he is only liable for the damages which have been foreseen or might have been at the time of making the lease. (4) And even where his refusal or inability to deliver them arises from his fraudulent act, the damages comprise only that which is an immediate and direct consequence of his inexecution. (5) For instance, a tenant cannot recover damages for the profit he might have made by leasing a theatre promised to him, to the government at an extra profit, the government buildings having been burnt down, although the refusal of the landlord was wilful and fraudulent. (6)

Even where no special damages have been proved by the tenant, and there was no malicious withholding on the part of the landlord, the Court will award nominal damages for the breach of obligation. (7)

But the term "vindictive" is sometimes misapplied to

(1) Riopel *v.* St. Amour, C. R. 1892, 1 Que. 238; Evans *v.* Moore, Q. B. 1888, 16 R. L. 668.

(2) Evans *v.* Moore, Q. B. 1888, 16 R. L. 668.

(3) Arts. 1072, 1200 C. Code.

(4) Art. 1074 C. Code.

(5) Art. 1075 C. Code; Bell *v.* Court, Q. B. 1886, M. L. R., 2 Q. B. 80; Lee *v.* L'Association de la Salle de Musique, S. C. 1855, 5 L. C. R. 134; Evans *v.* Moore, Q. B. 1888, 16 R. L. 668.

(6) Lee *v.* L'Association de la Salle de Musique, S. C. 1855, 5 L. C. R. 134.

(7) Mulcair *v.* Jubinville, C. R. 1878, 23 L. C. J. 165; Lee *v.* L'Association de la Salle de la Musique, S. C. 1855, 5 L. C. R. 134; and see Corporation du Comté d'Ottawa *v.* Cie. du Ch. de Fer, Supreme Ct. 1885, 14 Can. S. C. R. 193; but see McDougall *v.* McGreevy, P. C. 1889, 12 L. N. 379.

"nominal" or presumed damages, and *vice versa.* For instance, in the case cited above, (1) *nominal* damages of $100 were allowed, although none were proved, and the judge admitted that there was no malice or fraud on the part of the landlord. This sum was awarded in virtue of the discretion allowed our judges in assessing damages. On the other hand, in an earlier case, (2) *vindictive* damages to the same amount were awarded, no actual damage being proved, on the ground that the landlord had deliberately leased and given possession of the property to another tenant on account of the better price received.

But regarding the matter from a practical point of view, it is solely within the discretion of the judge to award damages for breach of contract, even where no damage has been proved and whether the breach was wilful or not.

In illustration of this, it may be mentioned that the Supreme Court has decided that where a party has suffered wrong, and is unable to prove the damages sustained by that wrong, the Court should not dismiss his action, but give him reasonable damages. (3) And the Court in this case allowed $100. But the Privy Council, in a later case, decided that though a person *wilfully* refuse to perform his part of an obligation, yet he will not be liable in damages, where it is *clear* that the other party has not suffered any. (4) Therefore each case must be decided, in this respect, according to its particular circumstances.

It is no defence for a landlord to set up that he was prevented from delivering the premises owing to the refusal of his former tenant to quit; he will still be liable, provided the tenant's right of enjoyment had commenced; (5) and, it may

(1) Mulcair *v.* Jubinville, C. R. 1878, 23 L. C. J. 165; and see Swanson *v.* Defoy, Q. B., 2 R. de Leg. 167.

(2) Lee *v.* L'Association de la Salle de Musique, 5 L. C. R. 134 (1855).

(3) Corporation of the County of Ottawa *v.* Montreal, Ottawa & Western Ry., Supreme Ct. 1886, 14 Can. S. C. R. 193, in appeal from Ct. of Appeal P. Q.

(4) McDougall *v.* McGreevy, P. C. 1889, 12 L. N. 379, in appeal from P. Q.

(5) Swanson *v.* Defoy, Q. B. 1847, 2 R. de L. 167.

be remarked here, that where the failure to deliver, on the part of the landlord, is caused by the forcible opposition of a third party, such act occurring before the occupancy of the tenant, the latter is not bound under Art. 1616 of the Civil Code to look to the third party for redress. (1) The landlord is obliged to deliver the thing leased, (2) or pay the penalty.

If the tenant is only enabled to, and does take possession of the premises considerably after the date stipulated for, in consequence of the landlord's delay in getting them ready, he is entitled to set off the damages suffered, in consequence, from the rent due under the lease in an action therefor by the landlord. (3)

If the tenant prefer to have his lease cancelled rather than wait for the premises until they are ready,—and he has his option in this respect, (4)—the damages allowed him will be those incurred preparatory to moving from his old premises, and for the deprivation of the new premises leased to him from the date they should have been delivered, to that of taking action to resiliate the lease. (5)

If the premises are delivered to the tenant in bad repair, under such circumstances as to make the remedying of the defects devolve upon the landlord, the tenant cannot retain an amount of rent proportionate to the damage suffered. (6)

2. Obligation to Maintain the Premises in a fit Condition for the Use for which they were Leased.

The lease of a house is a contract by which the landlord grants to the tenant the *enjoyment* of the premises leased

(1) *Ib.*

(2) Art. 1612 C. Code.

(3) Belleau *v.* Regina, Q. B. 1861, 12 L. C. R. 40.

(4) Riopel *v.* St Amour, C. R. 1892, 1 Que. 238; Evans *v.* Moore, Q. B. 1888, 16 R. L. 668.

(5) Evans *v.* Moore, Q. B. 1888, 16 R. L. 668.

(6) Weippert *v.* Iffland, K. B. 1820, 2 R. de L. 441; Loranger *v.* Perrault, S. C. 1854, Ramsay's Condensed Reports, p. 61. See Mulhaupt *v.* Enders, 38 La. Ann. 744 in same sense.

But in France a contrary doctrine prevails under the particular circumstances above stated; 1 Guillouard 101; 4 Aubry & Rau, p. 474; Cass, Sirey, 53-1-361; Cass, Sirey, 81-1-170; Douai, Sirey, 57-2-209; but see 25 Laurent 109.

during a certain time, etc., (1) and this involves, on the part of the landlord, the maintenance of the premises in a fit condition for the use for which they have been leased. (2)

As it is of the nature of the contract of lease that the landlord shall maintain the premises in a fit condition for the use for which they have been leased, nothing short of an express clause in the contract will absolve him from that obligation. (3) And even where there is an undertaking on the part of the tenant that all repairs to the premises that may be necessary, whether "*grosses*" or "*menues*," shall be made by him, this will not absolve the landlord from his obligation to make such repairs as would amount to a reconstruction of part of the premises, such as the making of a new roof rather than the repairing of an old one (4); or where, through some cause beyond the control of the tenant, the premises become so insalubrious as to be totally uninhabitable; (5) or where the premises are seriously damaged by fire; (6) but the effect of such a clause will be to disentitle the tenant to any reduction of rent, by way of damages, while repairs are being made. (7)

The express renunciation by the tenant, of his right to have such obligation performed, so far as the Court will construe it, is perfectly valid, and is not contrary to public order (8), the obligation, though being of the *nature* of the contract, is not of its *essence*. (9)

The Code expressly declares (10) that the landlord is obliged,

(1) Art. 1601 C. Code.

(2) Art. 1612 *ib.*

(3) 1 Guillouard 103; 17 Duranton, No. 61; 3 Duvergier, No. 278; Troplong, Nos. 164 *et seq*; Johnson *v.* Brunelle, S. C. 1886, 14 R. L. 219.

(4) Ross *v.* Stearns, S. C. 1885, M. L. R., 1 S. C. 448; confirmed in appeal M. L. R., 2 Q. B. 379; Brown *v.* Lighthall, C. Ct. 1888, 15 R. L. 694.

(5) Bagg *v.* Duchesneau, C. R. 1892, 2 Que. 350; but see Deault *v.* Ledoux, C. R. 1894, 5 Que. 293; and Simmons *v.* Gravel, C. Ct., 13 Q. L. R. 263.

(6) Samuels *v.* Rodier, Q. B. 1867, 2 L. C. L. J. 272.

(7) Rex *v.* Smith, K. B. 1817, 2 Rev. de Leg. 440.

(8) See Art. 990 C. Code.

(9) Deault *v.* Ledoux, C. R. 1894, 5 Que. 293; Hudon *v.* Plimsoll, C. Ct. 1886, 9 L. N. 322.

(10) Art. 1613.

during the lease, to make all necessary repairs, but, referring to a subsequent article, (1) it excepts those of a minor importance, and which, as a reference to some of the instances enumerated in that article will show, are of such a nature that they might naturally be presumed to arise through the fault of the tenant or his family, or to result from the ordinary use of the premises. (2) That this presumption is the basis of the tenant's obligation to make the lesser repairs, is evident from the succeeding article of the Code, (3) which absolves the tenant from this obligation when the repairs are rendered necessary by age or by irresistible force. The burden of proving that such repairs are necessitated by those causes devolves upon the tenant. (4)

With the exception, therefore, of lesser repairs under exceptional circumstances, the making of all other kinds devolves upon the landlord, even where the tenant receives the premises in bad condition, without complaint; but in this case, the *lesser* repairs will devolve upon the tenant, from whatever cause they may arise, except that of irresistible force. (5)

But Art. 1660 of the Civil Code provides that, if during the lease the premises be wholly destroyed by irresistible force, or a fortuitous event, or be taken for purposes of public utility, the lease is dissolved of course. It also provides that, if the premises be destroyed or taken in part only, the tenant may, according to circumstances, obtain a reduction of rent or the dissolution of the lease; but in either case he has no claim for damages against the landlord. (6) In the happening of the latter event, the Code makes no provision for restoring

(1) Art. 1635.

(2) 1 Guillouard 104. (The distinction between these two kinds of repairs, viz., landlord's repairs and tenant's repairs, will be treated of in a subsequent chapter.)

(3) Art. 1636.

(4) 1 Guillouard 104; Art. 1627 C. Code.

(5) Johnson *v.* Brunelle, S. C. 1886, 14 R. L. 219.

(6) A tenant cannot demand resiliation of the lease where he is disturbed in his enjoyment of the premises by the legitimate acts of the Government; he can only demand a diminution of rent. Walcot *v.* Ritchie, S. C. 1889. 15 Q. L. R. 165. Nor can he demand damages from the landlord in such case (*ib*). As to damages, see Panneton *v.* Fraser, S. C. 1893, 4 Que. 355.

the premises, but it is the better opinion that the landlord cannot be compelled to reconstruct where there has been a partial *loss* of the premises, but that anything in the nature of *repairs* necessitated by a fortuitous event will devolve upon him, if demanded, (1) when the lease is not cancelled, and it is merely a question of reduction of rent.

The demolition of the side wall of a house is a sufficient ground for the resiliation of the lease. (2) So is the use by the landlord, in making repairs, of material which emits a disagreeable odor, and damages the stock of the tenant, a grocer; (3) and in such case the damages sustained can also be recovered. (4) The tenant can also recover damages against the contractor for negligently executing repairs for the landlord. (5) Where premises leased for manufacturing purposes were damaged by fire, and subsequently the tenant visited the premises daily during two or three weeks while repairs were in progress, and the repairs were fully completed about a month after the fire, and the tenant did not protest for resiliation of the lease until fourteen days after the fire; it was decided by the Court that he was not entitled to obtain the dissolution of the lease, more especially as the legal presumption stood against him that the fire was due to his fault (see Art. 1629 C. Code) or the carelessness of his watchman, who was proved to have been drunk at the time it occurred. (6) But where a barber, who combined with his business the selling of cigars, rented a shop in a hotel, with the exclusive privilege of selling cigars therein, and the hotel was burnt and the

(1) 1 Guillouard 107; Pont in 3 Rev. Crit. (1853), p. 282; Marcadé, Art. 1722; 4 Aubry et Rau, p. 474; 25 Laurent 111; see 11 R. L. at p. 608. Troplong holds that the landlord would be bound to reconstruct the thing partially lost; see 1 *Louage* No. 220.

(2) Jacotel *v.* Gault, S. C. 1889, M. L. R., 5 S. C. 60.

(3) Daigneau *v.* Levesque, Q. B. 1886, M. L. R., 2 Q. B. 205.

(4) *Ib.*

(5) Mignon *v.* Brunet, S. C. 1895, 8 Que. 120.

(6) Pinsonneault *v.* Hood, S. C. 1892. 2 Que. 473; and see De Sola *v.* Stephens, S. C. 1884, 7 L. N 172, 13 R. L. 472; Heche *v.* McGauvreau, 10 R. L. 194; Gerriken *v.* Pinsonneault, Q. B., June, 1875.

shop damaged by water, thereby requiring three weeks for making repairs to such shop, this would not give rise to the resiliation of the lease, but the tenant could claim a remission of rental for a certain period to recoup him for damages. (1)

Repairs may be legally exacted from the actual proprietor of a property leased by a former proprietor. (2)

The tenant has a right of action, which he can exercise either by summary proceedings or in the ordinary course of law, to *compel* the landlord to make the repairs and ameliorations stipulated in the lease, or to which he is obliged by law; or to obtain authority to make the same at the expense of the landlord; or, if the tenant so declare his option, to obtain the rescission of the lease in the event of such repairs or ameliorations not being made. (3)

The tenant has also an action of damages for breach of the landlord's obligation in the above respect, (4) provided he first puts the latter in default by notifying him and making a demand upon him to perform the obligation; (5) which demand must be made in writing where the lease is a written one. (6) But a verbal notice from the tenant and a written one from the sanitary inspector has been held a sufficient written notice, (7) and even a commencement of proof in

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(1) Tardif *v.* Cie. de l'Hotel Balmoral, S. C. 1890, 20 R. L. 224.

(2) Sache *v.* Courville, Q. B. 1867, 11 L. C. J. 119, 2 L. C. L. J. 251.

(3) Art. 1641 C. Code.

(4) *Ib.*

(5) Art. 1070 C. Code; Decary *v.* Lafleur, Mag. Ct. 1890, 13 L. N. 314; Benson *v.* Vallière, S. C. 1894, 6 Que. 245; Acheson *v.* Poet, S. C. 1885, 29 L. C. J. 206 (repudiating Scanlan *v.* Holmes, 2 L. N. 185); Holland *v.* de Gaspé, C. R. 1891, M. L. R., 7 S. C. 440; Johnson *v.* Brunelle, S. C. 1886, 14 R. L. 219; Marcile *v.* Mathieu, S. C. 1883, 7 L. N. 55; Charbonneau *v.* Duval, C. Ct. 1885, 13 R. L. 309; Panneton *v.* Fraser, S. C. 1893, 4 Que. 355. See especially remarks of Dorion, C. J., in Daigneau *v.* Levesque, Q. B. 1886, M. L. R., 2 Q. B. at p. 207. But the French authorities hold that damages can be recovered without a putting in default where the landlord especially obliges himself in the lease to do a thing. Sirey, 65-2-199, 48-2-189; and see Scanlan *v.* Holmes, 2 L. N. 185, 9 R. L. 557.

(6) Art. 1067 C. Code; Marcil *v.* Mathieu, S. C. 1883, 7 L. N. 55; Fitzpatrick *v.* Darling, S. C. 1896, 9 Que. 247.

(7) Palmer *v.* Barrett, M. L. R., 6 S. C. 446.

writing, or an admission, will avail as such. (1) Damages run only from the date the defaulting party is notified. (2) A delay of one day between the putting in default and taking the action is not sufficient. (3)

The general rule regarding the proceedings the tenant should adopt, where he seeks either to have repairs made or to have the lease cancelled, may be stated as follows, attention first being directed to the fact that the present discussion relates to the repairs, properly so called, and not to *defects and faults* (vices et defauts) (4) in the premises, which will be dealt with under a subsequent heading. (5) Where the tenant takes possession of the premises leased to him, without complaint (the lease usually containing a declaration to that effect) (6), and such repairs as the law obliges the landlord to make become necessary, the tenant must notify his landlord to that effect, and if the latter fails to attend thereto, the former must, if he wishes to have the repairs made, summon the latter before the Court, and demand that he be ordered to make them, or that he, the tenant, be allowed to make the same at the landlord's expense ; or he may demand that, if the landlord, after being ordered by the Court to make the repairs, fails to do so, the lease be declared cancelled. (7)

There are some exceptions to the above. For instance, where the landlord has obliged himself in the lease, or is by

(1) Decary *v.* Lafleur, Mag. Ct. 1890, 13 L. N. 314.

(2) Filibien *v.* Moir, C. R. 1877.

(3) *Ib.*

(4) See Art. 1614 C. Code.

(5) See *infra*, p. 31.

(6) And see Art. 1633 C. Code

(7) Art. 1641 C. Code ; Boulanger *v.* Doutre, S. C. 1851, 4 L. C. R. 170 ; Pagels *v.* Murphy, C. R. 1886, M. L. R., 3 S. C. 50 ; Simmons *v.* Gravel, C. Ct. 1884, 13 Q. L. R. 263 ; Spelman *v.* Muldoon, S. C. 1869, 14 L. C. J. 306 ; Ginchereau *v.* Lachance, C. Ct. 1890, 16 Q. L. R. 117 ; Marchand *v.* Caty, S. C. 1879, 23 L. C. J. 259.

If the repairs are ordered by the tenant, the contractor who made them has his recourse against the tenant, and not the landlord ; and where the amount sued for is in excess of $50, evidence is not admissible to prove that the landlord had authorized the tenant to have such repairs made. Larochelle *v.* Baxter, C. Ct. 1891, 21 R. L. 87.

law bound, to put the premises in good tenantable condition, and he neglects to do so, the tenant may, after putting the landlord in default (1) (if there be time to do so), make such repairs as are *urgently* needed for the safety and health of the occupants, without having first obtained judicial authority, and may recover the cost of the same from the landlord. (2) Likewise, where the condition of the premises is such as *absolutely* to prevent the tenant's use and enjoyment, he may abandon them without incurring liability for rent from the day of his departure. (3)

The tenant is obliged, during the lease, to allow the landlord to make such repairs to the premises as are urgent and cannot be deferred, whatever may be the inconvenience caused to him,—in fact, even though he may be deprived, during their progress, of the enjoyment of a part of the premises. But if such repairs became necessary before the making of the lease, (4) he is entitled to a diminution of the rent according to the time and circumstances; and in any case, if more than forty days be spent in making such repairs, the rent must be diminished in proportion to time and the part of the premises leased of which he has been deprived. If the repairs be of a nature to render the pre-

(1) The French authorities hold that damages can be recovered without putting the landlord in default where he specially obliges himself in the lease to do a certain thing. Sirey 65-2-199, 48-2-189; 1 Guillouard 108; and see Scanlan *v.* Holmes, 2 L. N. 185, 9 R. L. 537.

(2) McCaw *v.* Barrington, C. R. 1889, 34 L. C. J. 78; confirming S. C. 1888, M. L. R., 4 S. C. 210; Palmer *v.* Barrett, S. C. 1890, M. L. R., 6 S. C. at p. 443; Heney *v.* Smith, C. Ct. 1887, 10 L. N. 333; 1 Guillouard 108; Sirey 42-2-[illegible]; 4 Pothier 129-131; 2 Troplong 351; Marcadé, Arts. 1730, 1731; 4 Aubry et Rau, p. 475.

(3) Wright *v.* Gault, S. C. 1883, 6 L. N. 42; Boucher *v.* Brault, S. C. 1870, 15 L. C. J. 117; Daigneault *v.* Levesque, Q. B. 1886, M. L. R., 2 Q. B. 205. See Pagels *v.* Murphy, C. R. 1886, M. L. R., 3 S. C. 50; Boulanger *v.* Doutre, S. C. 1851; 4 L. C. R. at p. 173; McCaw *v.* Barrington, S. C. 1888, M. L. R., 4 S. C. at p. 210. But see Wurtele *v.* Brazier, 2 R. de. L. 440, as to rent accrued during occupation; and see Art. 1660 C. Code in case of partial destruction.

(4) The French version of the Code, Art. 1634, has "*avant le bail*," which is the correct one. See 33 L. C. J. at p. 167.

mises uninhabitable for the tenant and his family, he may cause the lease to be rescinded. (1)

It is to be noted, however, that although the tenant is obliged to suffer certain repairs to be made, yet the landlord cannot make repairs in general without the former's consent. If the repairs are urgent, and the tenant refuses to give his consent to their being made, the landlord must have recourse to the Courts and obtain an order permitting them. Otherwise the tenant may restrain him by injunction. (2)

If the landlord, in making repairs, uses material which emits a strong odor, such as tarred felt for placing under the clapboarding of a wooden house, he will be liable for damages and to have the lease rescinded, if the premises repaired, being used for business purposes, and the goods stored therein being of an edible nature, become damaged. (3)

If the making of urgent repairs has occupied less than forty days, the tenant cannot demand any indemnity in the way of reduction of rent, except where, as in the above instance, the landlord has been exceptionally negligent or careless. (4) If the repairs occupy more than forty days, it is the better opinion that such indemnity should be based upon the whole of the period occupied in making them ; (5)

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(1) Art. 1634 C. Code. The lessor of a building rented for business offices is not liable to tenants for the stoppage of the elevator for some days, owing to its being out of order, and to provide electricity as the motive power, instead of water, provided the work was done with all possible despatch. Cooke *v.* Royal Ins. Co., S. C. 1893, 4 Que. 396.

A stipulation in the lease, that the tenant shall suffer such large repairs as may be deemed necessary, without demanding reduction of rent, only applies to repairs which may become necessary during the lease, and not to work necessary for the remedying of defects actually existing in the leased premises at the date of the commencement of the lease, and against which the landlord was bound to warrant the tenant. Masson *v.* Masson, S. C. 1894, 7 Que. 5.

(2) Bolduc *v.* Prévost, Q. B. 1886, 31 L. C. J. 68.

(3) Daigneau *v.* Levesque, Q. B. 1886, M. L. R., 2 Q. B. 205 ; 30 L. C. J. 188 ; confirming M. L. R., 1 S. C. 414.

(4) 1 Guillouard at p. 125 ; see also Morison *v.* Langevin, S. C. 1870 ; Dufresne *v.* Hubert, S. C. 1871 ; Langevin *v.* Senécal, S. C. 1869 ; Wiseman *v.* Coultry, S. C. 1874.

(5) 1 Guillouard 112 ; 3 Duvergier, No. 303 ; Marcadé, Art. 1724, 1 ; 7 Colmet de Sansterre, p. 246 (2nd edit.) ; 25 Laurent 140.

Art. 1634 of the Code declaring that in such case "the rent must be diminished in proportion to time."

The right to have the lease rescinded where the premises become uninhabitable through the making of repairs exists irrespective of their duration. (1) If the Court determines that the tenant has been deprived, not only of the whole of the premises, but even of an important part thereof, so as to essentially deprive him of their use for the purpose for which they were leased, the tenant may have the lease cancelled, even when the premises are other than dwelling houses; for instance, in the case of shops or stores. (2) Where the damages necessitating repairs are presumably occasioned by fire started through the negligence of the tenant, the Court will construe more strictly the latter's right to have his lease cancelled, if, in making the repairs, he is obliged to leave the premises for some weeks; (3) although, if partial destruction had made the premises absolutely unfit for the uses assigned to them, the tenant would be entitled to get free of the lease, while being still liable for the loss caused by the fire. (4)

3. To Warrant the Tenant against all Defects and Faults.

The landlord is obliged to warrant his tenant against all defects and faults in the thing leased, which prevent *or diminish* its use, whether known to the landlord or not (5), and whether existing before or arising during the lease. (6) A violation of this obligation will give rise, either to damages alone, or to discharge from rent, or resiliation of the lease

(1) 1 Guillouard 113; 25 Laurent 142.

(2) 1 Guillouard 113, 114; 25 Laurent, No. 142; 7 Colmet de Sansterre, No. 170; 3 Duvergier, No. 300; Sirey 62-2-277; Pinsonneault *v.* Hood, S. C. 1892, 2 Que. 473; and see De Sola *v.* Stephens, S. C. 1884, 7 L. N. 172; Gerriken *v.* Pinsonneault, Q. B., June, 1875.

(3) Pinsonneault *v.* Hood, S. C. 1892, 2 Que. 473; Gerriken *v.* Pinsonneault, Q. B., June, 1875.

(4) *Ib.*, and see Art. 1660.

(5) Art. 1614 C. Code.

(6) Benson *v.* Vallière, S. C. 1894, 6 Que. 245; 1 Guillouard 120; 1 Troplong, No. 199; 4 Aubry et Rau, p. 477; Massé *v.* Vergé, p. 362; Note 6.

with damages. (1) But the landlord will not be held liable in *damages* where the defects were unknown to him, or where he was not, by reason of his profession or trade, bound to know of their existence. (2) Nor, in an action of damages only, will he be liable, unless, occupancy having commenced, the tenant proves that he is without fault. (3) The landlord is also absolved from the warranty where the defects or faults complained of by the tenant, whether apparent or not, are inherent in the locality in which the premises are situated. For instance, it is notorious that certain low-lying localities give rise to damp houses, and even to periodical inundations, and that, in consequence, the cellars are subject to be flooded. (4) And, again, it is notorious that the sewers of our cities are infested with rats, and if, the premises being free from rat holes at the date of occupation, the occupants are invaded by swarms of these animals, this would not entail any warranty on the part of the landlord. (5)

Secondly, the landlord is not obliged to warrant the tenant against defects which are apparent, or against those which the tenant has either tacitly or expressly acquiesced in. (6) But it may be remarked that the fact that a tenant continues to dwell in a house for some time after its unsanitary con-

(1) Art. 1641 C. Code. Peatman *v.* Lapierre, S. C. 1889, 18 R. L. 35; Masson *v.* Masson, S. C. 1894, 7 Que. 5; Benson *v.* Vallière, S. C. 1894, 6 Que. 245.

(2) Masson *v.* Masson, S. C. 1894. 7 Que. 5; Peatman *v.* Lapierre, S. C. 1889, 18 R. L. 35; Benson *v.* Vallière, S. C. 1894, 6 Que. 245. The contrary is now generally held in France, but the difference between our article of the Code and the corresponding article of the Code Napoleon would partly account for this. See 1 Guillouard No. 125; but see our Art. 1660 C. Code.

(3) Juteau *v.* Major, S. C. 1892, 2 Que. 428; Art. 1627 C. Code.

(4) Motz *v.* Houston, 2 R. de Leg. 440, K. B. 1817; Doutre *v.* Walsh Q. B. 1865, 1 L. C. L. J. 56; Scanlan *v.* Holmes, S. C. 1881, following Sirey 49-2-77; Peatman *v.* Lapierre, S. C. 1889, 18 R. L. 35; 1 Guillouard, No. 122, and cases there cited.

An overflow of the Mississippi is not such an extraordinary accident as to entitle tenants to an abatement of rent. Jack *v.* Mitchie, 33 Louisiana Annual 723.

(5) 1 Guillouard 122; Caen, 3rd July, 1885, *Recueil de Caen*, 1886, p. 138.

(6) Peatman *v.* Lapierre, S. C. 1889, 18 R. L. 35. By analogy, Arts. 1522, 1523, 1524, C. Code; Doutre *v.* Walsh, Q. B. 1865, 1 L. C. L. J. 56; 1 Guillouard 122.

dition has manifested itself, would not necessarily amount to his acquiescence therein. (1)

The remedy of the tenant, in the event of the premises leased by him becoming uninhabitable or diminished in their use, owing to defects or faults therein, has presented some difficulty, and a corresponding uncertainty in our jurisprudence. Undoubtedly, in all cases (2) the landlord must be put in default, in the manner already explained, (3) before damages can be recovered or the lease cancelled. (4) The next question is, whether, after such default the tenant can obtain a resiliation of the lease without due legal process or an order from the Court. If the question is simply one of repairs, according to the usual interpretation of that word, then undoubtedly the procedure to be adopted is that previously laid down. (5) But we are now treating of hidden defects or faults in the premises leased. Again, undoubtedly the proper course, where it is available, is to have the landlord condemned by the Court to have the repairs or alterations made necessary to put the house in a proper condition. (6) But it is clear that there must be cases where the condition of the premises will justify their sudden and immediate abandonment, with resiliation of the lease. The chief difficulty lies in determining what is or what is not a sufficient ground for adopting such a course. The best opinion is to the effect that, where a house becomes uninhabitable according to medical and sanitary authorities, owing to its *defective con-*

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(1) Thibault *v.* Paré, Q. B. 1893, 3 Que. at p. 52, per Blanchet J.

(2) Acheson *v.* Poet, S. C. 1885, 29 L. C. J. 206. But see Scanlan *v.* Holmes, 2 L. N. 185.

(3) *Supra*, p. 27 (A notarial protest is usually preferred.)

(4) Palmer *v.* Barrett, S. C. 1890, M. L. R., 6 S. C. 446 ; Benson *v.* Vallière, S. C. 1894, 6 Que. 245 ; Thibault *v.* Paré, Q. B. 1893, 3 Que. 48 ; Fyfe *v.* Lavallière, Mag. Ct. 1889, 12 L. N. 147 ; Acheson *v.* Poet, S. C. 1885, 29 L. C. J. 206.

(5) *Supra*, p. 28.

(6) Belanger *v.* De Montigny, C. R. 1894, 6 Que. 523 ; Seymour *v.* Smith, C. R. 1889, 33 L. C. J. 165 ; and see Boulanger *v.* Doutre, S. C. 1851, 1 L. C. R. 393, 4 L. C. R. 170 ; Boucher *v.* Brault, C. R. 1871, 15 L. C. J. 274.

struction—where, for instance, there is no connection between the sink and the drains in the street—and the landlord, being formally protested, refuses or neglects to remedy the defect, the tenant can abandon the premises, even within six days after the protest, and sue for a resiliation of the lease. (1) And it may be safely stated that, in any case, where the premises have become, without the fault of the tenant, not only insalubrious, but where there is immediate and extreme danger to health in their further occupation, and the landlord, upon being formally requested, has either refused or failed to remedy the defect, the tenant can abandon the premises and have the lease cancelled. (2)

But where such an extreme cause for abandoning the premises does not exist; where, for instance, they are merely insalubrious without being immediately and urgently dangerous, it is clear that the safest course for the tenant to adopt would be to sue the landlord to have the defect remedied, with a demand that upon his default or failure to do so, he, the tenant, may have the lease cancelled. (3) The reason is this: The landlord is obliged to warrant his tenant against all defects or faults in the premises leased, and, as already stated, (4) whether the defect existed before or occurred after the lease; but where a hidden defect becomes noticeable to the tenant some time after occupation, it may turn out upon investigation that such defect arose more through wear and tear of the premises than through any

(1) Thibault *v.* Paré, Q. B. 1893, 3 Que. 48. In that case, the Court remarked, it is § 2 of Art. 1641 that becomes applicable, viz.:—The tenant has an action "to rescind the lease for failure on the part of the lessor to perform *any other* of the obligations arising from the lease or devolving upon him by law,"—rather than § 1 of said article, Benson *v.* Vallière, S. C. 1894, 6 Que. 245; and see Tylee *v.* Donegani, C. R. 1871, 3 R. L. 441; Fyfe *v.* Lavallée, Mag. Ct. 1889, 12 L. N. 147.

(2) Palmer *v.* Barrett, S. C. 1890, M. L. R., 6 S. C. 446; Benson *v.* Vallière, S. C. 1894, 6 Que. 245; Tylee *v.* Donegani, C. R. 1871, 3 R. L. 441; Fyfe *v.* Lavallée, Mag. Ct. 1889, 12 L. N. 147; and see Doutre *v.* Boulanger, 4 L. C. R. 170. Remarks of Day J. Otherwise, if the landlord has not been put in default. Seymour *v.* Smith, C. R. 1889, 33 L. C. J. 165.

(3) Belanger *v.* De Montigny, C. R. 1894, 6 Que. 523.

(4) *Supra*, p. 19.

radical defect in their construction. In that case the question resolves itself into one of repairs, and it would not be sufficient merely to put the landlord in default by protest in order to secure the right to have the lease cancelled upon his refusal to make such repairs, for the case would be governed by § 1 of Art. 1641 C. Code, which requires a previous order of the Court to effect that purpose, (1) always excepting cases of extreme urgency. It is only where the defect is purely one of construction, or, more properly, an original hidden defect, as for example the premises having become unsanitary, the landlord has, after request made to him, refused to remedy such defect, that the tenant is entitled to abandon the premises and to demand a cancellation of the lease without a previous order from the Court, such a case being governed by § 2 of Art. 1641 C. Code. (2) The necessity of appealing to the Courts in all but the most urgent and extreme cases is apparent, for nothing short of the appointment of experts (3) to examine the premises and an adjudication upon the respective rights of the parties will suffice to determine: 1st, whether the defect complained of is one which the tenant has impliedly or expressly acquiesced in; 2nd, whether the defect is purely an original one or arises wholly or partly from age; 3rd, whether the tenant is at fault, such as carelessness in allowing a drain to choke up by letting things pass through which it was not intended to receive, (4) or whether the unsanitary condition of the premises is due to his uncleanliness, or carelessness in ventilating them; 4th, whether the defect is sufficient to give rise to a cancellation of the lease or merely a reduction of rent.

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(1) See *supra*, p. 28.

(2) See *supra*, p. 34.

(3) Simon *v.* Larue, Prev. de Que. 1737, Perrault p. 30.

(4) See Art. 1627 C. Code, which presumes fault on the part of the tenant during his enjoyment in case of *injuries* or *loss* to the premises.

4. To Warrant the Tenant against Disturbance.

1st. Disturbance by the Landlord Himself.

The landlord is obliged to give peaceable enjoyment of the premises during the continuance of the lease, (1) which means that he must not only warrant his tenant against disturbance by third parties, as expressly stated in Arts. 1616–1618 C. Code, but against disturbance by himself whether of a legal or material character. (2)

The landlord cannot, during the lease, change the form of the premises leased (3) either directly or *indirectly*. (4) Thus, where premises are leased to a photographer for the purpose of carrying on his business therein, and the landlord afterwards constructs a wall on the adjoining property, of such a height and in such a position as to deprive the photographer of part of the light necessary to the carrying on of his business, the tenant will be entitled to have his lease cancelled and to the full amount of damage sustained. (5) Also, where a landlord allows one of his tenants to change the destination of the premises leased to him, and to carry on therein a manufacturing business which has the effect of rendering the premises of the adjoining tenants under the same landlord uninhabitable, the landlord will be held to have sanctioned such use of the premises, and his responsibility towards his other tenants will be the same as if express permission for such use had been given by him in the lease. (6) An action to have such nuisance suppressed will lie against the landlord after written notice to him (7) under Art. 887 C. C. P. relating to summary matters, Art. 1641 of the C.

(1) Art. 1612 C. Code.
(2) See 1 Guillouard 127.
(3) Art. 1615 C. Code.
(4) 1 Guillouard 132.
(5) Remillard *v.* Cowan, S. C., 6 Q. L. R. 305.
(6) Procureur Général *v.* Coté, S. C. 1887, 3 Q. L. R. 235.
(7) Fitzpatrick *v.* Darling, S. C. 1896, 9 Que. 247.

Code not providing for such a demand. (1) Held thus, where the contiguous premises are leased by him for immoral or dangerous purposes. (2)

On the same principle, we think the landlord also owes it to his tenant not to set up a business similar to the latter's in the same block owned by him, nor to allow another of his tenants to do likewise. (3) It is usual for leases between a landlord on the one side, and a tenant, who is a trader or manufacturer, on the other side, to contain a clause to the above effect; but in view of the uncertainty that surrounds this question, particular care should be taken by the tenant to have such a clause inserted in the lease. And even with or without such a clause, the tenant has no ground of complaint if an industry similar to his already existed on the premises. (4) Whatever may be the argument where a *new* block of stores is at once offered for rental—and we think even in that case the landlord should be held liable in damages towards an injured tenant, where he leases two stores in that block to two separate parties carrying on the same business—(5) yet, where the stores in a block have already been rented for stated purposes, we think it is clear the landlord owes it to those tenants not to bring therein rival establishments, and for this reason: On the one hand, the Code contains provisions that a tenant may only

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(1) *Ib.*

(2) Fitzpatrick *v.* Darling, S. C. 1896, 9 Que. 247; 1 Guillouard 135, and authorities there cited; see also Crathern *v.* Sœurs de St. Joseph de l'Hotel Dieu, 12 L. C. R. 497.

The tenant of a room can be evicted if the neighbors complain of noise made by him in the course of pursuing his trade (making shoes with wooden soles), Léger *v.* Maufils, Prevosté de Quebec, Perrault's Conseil Supérieur, p. 10.

(3) Styles *v.* Myler, S. C. 1886, 14 R. L. 517; 1 Guillouard 139; Dalloz 57-2-125; Agnel 203; 4 Massé & Vergé, § 704, note 8, p. 363. But the French authors are very much divided upon this point, likewise the jurisprudence.

(4) 1 Guillouard 141; Agnel 205; and see Styles *v.* Myler, S. C. 1886, 14 R. L. 516; where it was apparent by the structure of the other buildings which were under the same roof, that they were intended for similar purposes, such as hotels or boarding houses; and see Crathern *v.* Les Sœurs de St. Joseph de l'Hôtel Dieu, S. C. 1862, 12 L. C. R. 497.

(5) See 1 Guillouard 138.

use the premises leased by him for the evident purpose for which they are rented, (1) or for which they are designed, or according to the terms and intention of the lease. (2) For instance, premises leased for the express purpose of concerts, lectures, fairs, bazaars, clubs, societies, public exhibitions and meetings, could not be used for the holding of religious meetings of the Salvation Army. (3) To offset such provisi[on] in favor of the landlord we have others in favor of the ten[ant], viz.:—he is entitled to a *peaceable* enjoyment of the premises during the lease, (4) and the landlord cannot, while it lasts, change the form of the premises. (5) This has been interpreted unanimously by the commentators, as implying that the landlord cannot disturb his tenant by permitting on the contiguous premises owned by him immoral, dangerous or disagreeable industries; (6) why, then, should a landlord be allowed with impunity to change the destination of premises contiguous to those of his tenant with the result of seriously embarrassing the latter's business by competition, where the tenant is expressly prohibited by law from adapting him[self] to the changed circumstances by engaging in a new busi[ness] in the same premises? It is the policy of the law, especially in this country, to discourage any contractual obligations which restrict the freedom of trade; but it is well recognized that where the restriction is a purely local one, and confined to the immediate vicinity of the business which it is desired to

(1) Art. 1624.

(2) Art. 1626 C. Code.

(3) Pignolet *v.* Brosseau, Q. B. 1891, M. L. R., 7 Q. B. 77, 21 R. L. 1.
A retail store leased to a wine merchant could not be sublet by the latter to a locksmith. (Paris, 25 March, 1817; Dalloz vo. *Louage* No. 272.)
A shop rented and always used as a grocery store, could not be used by the tenant as a baker's shop (Bourges, 4 March 1842; Dalloz *loc cit.*)
Where a shop has a good-will attaching to the premises, derived from but apart from that of its late occupants, a tenant thereof cannot close it for a considerable period. Such closing would be ground for cancellation of the lease. (Dalloz, Rep. vo. *Louage*, No. 278; and Latreille *v.* Charpentier, C. Ct. 1885, 29 L. C. J. 233.)

(4) Art. 1612 C. Code.

(5) Art. 1615 C. Code.

(6) *Supra*, p. 36; Fitzpatrick *v.* Darling, S. C. 1896, 9 Que. 247.

protect, covenants relating thereto will be strictly upheld. At any rate, Art. 1624, § 1, is in itself an exception to this policy, and should, we think, be met by a like exception in favor of the tenant. The consequence to the landlord, of allowing such unfair competition against his tenant, should be either cancellation of the lease or diminution of rent, with damages in both cases. (1)

The landlord is entitled to visit the premises leased by him in order to ascertain what repairs may be needed, or he may order workmen to make such investigation. He may also allow persons to inspect the premises with a view to becoming tenants, at such period before the expiration of the current lease as is allowed by local usage. (2)

2. *Disturbance by the Government, whether Municipal or Parliamentary.*

As stated before, (3) if, during the lease, the premises be taken for purposes of public utility, the lease is dissolved of course; but if they be taken in part only, the tenant may, according to circumstances, obtain a reduction of rent or the dissolution of the lease; but in either case, he has no claim for damages against the landlord. (4) The tenant cannot exercise his choice between the two alternatives in the case of a partial taking; this is a matter for the appreciation of the Court. (5) All of the foregoing which relates to a partial taking, is applicable to the case of disturbance on the part of the authorities acting lawfully and in the regular course of

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(1) 1 Guillouard 142.

(2) 1 Guillouard 143; Pothier 203; Agnel 420; and see Art. 1024 C. Code. Three months before expiration of lease, and during reasonable hours in the case of dwelling houses is the usage in our cities, but the matter being one of some uncertainty, notarial leases always contain a stipulation to that effect.

(3) *Supra*, p. 25.

(4) Art. 1660 C. Code; see *infra*, Chap. vi., "Termination of the lease,—Expropriation," § 9.

(5) 25 Laurent, No. 402; Ritchie *v.* Walcott, S. C. 1889, 15 Q. L. R. at p. 170, and authorities there cited; and see Art. 1618 C. Code.

their duties. (1) If, however, the authorities act illegally or abusively, then they are in the position of trespassers, and for the disturbance of the tenant traceable thereto the landlord will not be held liable in warranty; (2) the tenant's recourse will be either against the government by petition of right or by action of damages against the municipality expropriating.

The word "disturbance" must be held to include an act of the government or municipality ordered in the interest of the public health, safety, or welfare, (3) but the landlord's liability in warranty will cease when such an act has arisen through the abuse of the tenant; (4) neither will he be liable where the modification of the premises is of such a nature as to be included in those risks incidental to commercial undertakings, such as where theatres are obliged by municipal by-law to adopt proper measures of safety for the exit of their audiences. (5)

3. *Disturbance by Third Parties.—Trespass.*

The landlord is not obliged to warrant the tenant against disturbance by the mere trespass of a third party not pretending to have any right upon the thing leased; saving to the tenant his right of damages against the trespasser. (6) And if the tenant's right of action against the latter be ineffectual by reason of his insolvency, or of his being unknown, such tenant will be entitled to indemnity from

(1) Ritchie *v.* Walcott, S. C. 1889, 15 Q. L. R. 165; 1 Guillouard, No. 149, and cases there cited, and 154.

(2) Art. 1616 C. Code; 1 Guillouard 147; 25 Laurent 148; 4 Aubry et Rau, p. 479.

(3) 1 Guillouard 150 *et seq.*; 4 Aubry et Rau, pp. 478–479; 25 Laurent 152.

(4) *Ib.*: Should a tenant sustain damage in consequence of a constitutional police legislation, adopted subsequent to his contract of lease, such as the "*Sunday law*," which forbids the use of the property rented, to a particular use, to which the lessee applies it, in a special way and on a special day, such damage is *injuria sine damno*, which is not compensable. Abadie *v.* Berges, Supreme Ct. Louisiana, 41 La. Ann. 281.

(5) Dalloz, 84-2-63; 1 Guillouard 150. (1)

(6) Art. 1616 C. Code.

the landlord by way of reduction of rent. (1) As the landlord is not liable toward his tenant for the trespass of third parties, so, inversely, he is not liable toward third parties for the negligent use of the premises by the tenant; where, for instance, damage is caused by sparks from a furnace chimney, provided there is no defect in the construction of the furnace. (2) If the trespass of a third party result in material injury to the leased premises, it would appear that where the tenant fails to act against the trespasser, the landlord may take action against him in his own name; saving the trespasser's right to call in the tenant so as to protect himself against a second action by the latter. (3)

Sometimes the trespass of a third party is accompanied by an assertion of right made by him at the time of the commission of the act. In this case the disturbance should be treated as a mere trespass, and the tenant should bring suit against the trespasser for the recovery of the damages which he has suffered by reason of such trespass, and to prohibit the trespasser from further disturbing him in his enjoyment. And if the trespasser by his plea raises a claim of right, the tenant should notify his landlord of the disturbance, and can then bring an action in warranty against the latter for the purpose of obtaining a reduction of rent and damages. (4)

4. *Disturbance Caused by One Tenant to Another.*

It has been doubted, where a tenant causes a disturbance to another tenant of the same landlord and under the same roof, whether the latter's recourse is against the landlord or

(1) Arts. 1617 and 1660 C. Code, and see Panneton *v.* Fraser, S. C. 1893, 4 Que., at p. 358. If repairs become necessary in consequence of a trespass, the tenant is bound to put the landlord in default to make said repairs, before he can claim damages from the landlord for delay in making the same. *Ib.* at p. 356. See also as to construction of Art. 1660 in case of trespass, *infra* p. 47

(2) Dufour *v.* Roy, Q. B. 1885, 11 Q. L. R. 192, 8 L. N. 75, 14 R. L. 511; 1 Guillouard 158. (1)

(3) 1 Guillouard 164; Sirey 70-2-247.

(4) Great North-Western Telegraph Co. *v.* The Montreal Telegraph Co., Supreme Ct. 1891, 20 Can. S. C. R. 170; confirming M. L. R., 6 Q. B. 257; 34 L. C. J. 35, 20 R. L. 412, S. C., M. L. R., 6 S. C. 74.

the tenant causing the disturbance. Where the tenant shelters himself behind his lease, then it is clear that the action of the injured tenant must be in warranty against the common landlord. (1) But apart from this, it has sometimes been held that the recourse is by direct action against the tenant causing the disturbance, (2) where the action is one of damages. The better opinion, however, now is, that the tenant, author of the trouble, cannot be considered as a third party under Art. 1616 C. Code. (3) The action should, therefore, in all civil cases of disturbance by a tenant toward another tenant, be brought against the common landlord. It is he who has the selection of his tenants, and must therefore answer for their conduct towards each other. (4) The landlord should, however, be put in default before suit is brought against him, where it is possible to do so. (5)

5. *Judicial Disturbance.*

If the disturbance be in consequence of a claim concerning the right of property, or other right in and upon the premises leased, the landlord is obliged to suffer a reduction in the rent, proportional to the diminution in the enjoyment of the thing, and to pay damages according to circumstances, *provided the landlord be duly notified of the disturbance by the tenant*. (6) Upon any action brought by the claimant, the tenant is entitled to be dismissed from the cause simply upon declaring to the claimant by dilatory plea the name of his landlord. (7)

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(1) See Art. 1618 C. Code; 1 Guillouard 165; Sirey, 69-2-132.

(2) Boily *v.* Vezina, C. Ct. 1864, 14 L. C. R. 325; Pigeon *v.* Roussin, C. Ct. 1881, 4 L. N. 326.

(3) Bernard *v.* Coté, C. R. 1892, 2 Que. 83; Mann *v.* Neild, Q. B. Sept., 1875, Montreal; overruling the above cases; 1 Guillouard 165; 4 Massé et Vergé, § 701, p. 366, n. 4; Sirey, 76-2-146; Sirey, 82-1-225; Agnel No. 507.

(4) 1 Guillouard 165.

(5) Marcil *v.* Mathieu, S. C. 1883, 7 L. N. 55.

(6) Art. 1618 C. Code.

(7) *Ib.* Demers *v.* Samson, 8 Q. L. R. 345; Dupuis *v.* Bouvier, 27 L. C. J. 339; Lawlor *v.* Cauchon, 6 Q. L. R. 13.

The tenant cannot himself ask for the dismissal of a petitory action brought against him; he may simply ask to be dismissed from the cause when the landlord indicated by him shall have been brought in. If the landlord designated by the tenant denies that he is the landlord, the tenant, on notice of such defence, will be obliged to prove the truth of his declaration. (1)

A judicial disturbance may arise either by an action of a third person setting up a claim of right to the detriment of the tenant, or by an exception setting up a claim of right in answer to an action of damages brought by the tenant against a trespasser. (2) The procedure to be adopted in the latter instance has been explained in a former section. (3) Until a judicial disturbance has arisen, and a partial eviction has been the consequence thereof, no claim by a tenant for reduction of rent can be maintained. (4)

The necessity for giving notice of the disturbance must be emphasized, for not only will the tenant's failure to do so deprive him of all recourse against his landlord if the latter is prejudiced thereby, but it might compromise the landlord's rights, in which case the tenant will be held liable to him to the extent of his loss. (5)

If the tenant is evicted of such a portion of the premises, that without it he would not have leased them, he will be entitled to cancellation of the lease, as in the case of a total eviction. (6) And, however small the portion of which he is deprived, the tenant will be entitled to a proportional reduction of rent. (7)

(1) Dupuis *v.* Bouvier, C. R. 1883, 27 L. C. J. 339.

(2) Great North-Western Telegraph Co. *v.* The Montreal Telegraph Co., Supreme Ct. 1891, 20 Can. S. C. R. 170, confirming M. L. R., 6 Q. B. 257; 34 L. C. J. 35, 20 R. L. 412, and M. L. R., 6 S. C. 74.

(3) *Supra*, p. 41.

(4) Gt. N. W. Tel. Co. *v.* Mont. Telegraph Co., *supra*.

(5) 1 Guillouard 167; 25 Laurent 165; 4 Aubry et Rau, p. 480; 3 Duvergier 323.

(6) 1 Guillouard 168; 3 Duvergier 321.

(7) *Ib.*

The damages in case of eviction will, as the Code declares, (1) be due by the landlord according to circumstances; which will require that if the landlord had previous knowledge of the cause of the disturbance, or likewise the tenant, this must be taken into account in estimating the measure of damages, or as a ground for refusing them; or that, if the disturbance arose through a cause beyond the control of the landlord, such as a fortuitous event or an act in the nature thereof, or where the tenant has accepted the premises with all risks attaching thereto, no damages will be due by the landlord. (2) In other respects the indemnity will be regulated by the articles of the Code relating to damages resulting from the inexecution of obligations in general, which would include the loss that the tenant has sustained and the profit of which he has been deprived, (3) provided that the loss or profit is such as might have been foreseen at the date of passing the lease, and the landlord has not acted fraudulently. (4)

The acceptance of the premises by the tenant, with all risks attached thereto, will only dispense the landlord from the payment of *damages* in the event of the tenant's eviction partial or total; it will not entitle the landlord to demand the full rent. Nothing short of an express clause in the lease, whereby the tenant undertakes to pay the rent in the event of his eviction, will entitle the landlord to demand it upon the occurrence of that event. (5)

6. *Damages Caused by Neighboring Proprietor.*

The landlord is obliged to warrant his tenant against disturbance in consequence, not only of a claim concerning the right of property in the premises leased, but also concerning

(1) Art. 1618.

(2) See 1 Guillouard 169 to 171, and Art. 1660 C. Code.

(3) Art. 1073 C. Code; and see Pothier, *Louage*, 92; Marcadé, Art. 1725 *et seq.*; 1 Troplong 277.

(4) Art. 1074 C. Code.

(5) 1 Guillouard 169-170.

any *other right in and upon the thing leased.* (1) This provision of the law clearly includes the exercise by a neighbor of his right of *mitoyenneté* or right of ownership in the party wall and of other servitudes. Therefore, where a party wall has been demolished by a neighbor in the exercise of his right of *mitoyenneté,* the tenant has recourse against the landlord by way of reduction of rent or cancellation of the lease according to the extent of the disturbance. (2) This is the limit of the tenant's recourse, for he cannot claim damages, the disturbance being in the nature of a fortuitous event so far as the landlord is concerned. (3)

But if the neighboring proprietor abuses his rights in demolishing the party wall, the tenant can recover damages from him by direct action, such abuse constituting a disturbance by trespass. (4) If, however, the proprietor performs his work with reasonable care, skill and speed, he will not be liable either to the landlord or the tenant, for he is acting in the use of a right which the law has conferred upon him. (5)

It has been held that the demolition of a side wall of a house by a neighbor exercising his right of *mitoyenneté* renders it uninhabitable, so that the lease will be cancelled in consequence thereof, even where there was an express stipulation therein, to the effect that the tenant obliges himself to permit all necessary repairs. (6) If, however, the house has not become uninhabitable, the tenant will be entitled to a dim-

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(1) Art. 1618 C. Code.

(2) Russell *v.* Clay, C. R. 1894, 6 Que. 62; Peck *v.* Harris, Q. B. 1862, 12 L. C. R. 355, 6 L. C. J. 206; Lyman *v.* Peck, Q. B. 1862, 12 L. C. R. 355 and 368; 6 L. C. J. 214; overruling Delvecchio *v.* Joseph, S. C. 1859, 3 L. C. J. 226; and see Art. 1660 C. Code; 1 Guillouard 183; Panneton *v.* Fraser. S. C., 4 Que. 355.

(3) *Ib.*

(4) Russell *v.* Clay, C. R. 1894, 6 Que. 62; Moynaugh *v.* Angus, Q. R., S. C., see Abbott's Ry. Law, p. 184; Art. 1616 C. Code; 1 Guillouard 181.

(5) Lyman *v.* Peck, Q. B. 1862, 6 L. C. J. 214; 12 L. C. R. 368; 1 Guillouard 181; Chaussé *v.* Lareau, C. R. 1881, 4 L. N. 351.

(6) Jacotel *v.* Gault, S. C. 1889, M. L. R., 5 S. C. 60; Coleman *v.* Haight, Supreme Ct. Louisiana, 14 La. Ann. 564.

inution of rent provided he be deprived of a definite proportion of the premises during any time. (1) If repairs become necessary to the leased premises in consequence of the acts of the adjoining proprietor in demolishing and rebuilding the mitoyen wall, the landlord is bound to make such repairs within a reasonable time, but he will not be liable in damages for delay in making the same unless he has been put in default to do so. (2)

Where the demolition and reconstruction of a party wall is necessitated by its age and consequent deterioration, the case must be regulated by Art. 1634 Civil Code, for the question is resolved into one of necessary repairs, which it is the duty of the tenant to submit to, under certain restrictions as to his rights. (3)

A proprietor can also cause a disturbance to his neighbor by acts other than those done by virtue of his right of *mitoyenneté*, and a distinction should be made between acts of trespass properly so called and those which are performed in pursuance of a legal right. For it is to be noted that the landlord's exemption from warranty under Art. 1616 Civil Code, in the event of mere trespass by a third party, is subsidiary to his principal obligation under Art. 1612 Civil Code to give peaceable enjoyment of the premises during the lease. (4) For instance, where a proprietor, or his representative, piles rubbish against a party wall for a long period, thereby causing it to fall over onto his neighbor's premises, and greatly disturbing such neighbor's tenant then occupying the premises, the latter has a direct action against the neighboring proprietor, the damage being caused solely through the negligence and positive fault of a third party known to the plaintiff, and independently of any right of *mitoyenneté* in the wall. (5) Another kind of disturbance is where an

(1) Panneton *v.* Fraser, S. C. 1893, 4 Que. at p. 358; 1 Guillouard 182.
(2) Panneton *v.* Fraser, S. C. 1893, 4 Que. 356.
(3) See *supra*, p. 29; 1 Guillouard 180.
(4) 1 Guillouard, p. 182.
(5) Gallagher *v.* Allsopp, Q. B. 1858, 8 L. C. R. 156, 6 R. J. R. Q. 183.

adjoining proprietor causes a nuisance to his neighbor's tenant while exercising a legal right; such as the demolition of his house and the erection of a new one, which invariably causes considerable damage and annoyance by dust, etc., if the adjoining tenant be a storekeeper. The damage to the adjoining tenant in a like case, if moderate, arises from a cause which everyone must take into account when leasing a house in a town, and so long as the work is done in accordance with the conditions laid down by the local by-laws, according to local usage, and within a reasonable time, the tenant can receive no indemnity either from his landlord or the adjoining proprietor. (1) But if the damage, although temporary, be of a serious and abusive nature, the tenant can look to his landlord to have the cause abated and for a reduction of rent, and to the third party for damages; provided he takes action at such time as to allow of the nuisance being abated before serious damage is committed. (2)

If the disturbance of the tenant by the act of an adjoining proprietor be of a continuing or permanent nature, and where it surpasses the usual inconveniences which neighbors must expect from each other, the tenant has an action against the latter to recover damages to the extent of his loss; he has also, independently of the action against the adjoining proprietor, an action against his landlord in reduction of rent or cancellation of the lease, according to circumstances, but not in damages. (3) Art. 1616 Civil Code, which exempts

(1) 1 Guillouard 177; and see Art. 406 C. Code.
A proprietor cannot demand the demolition of a stable on an adjoining lot, especially where his house has been built subsequently to the existence of the stables, provided they be kept in a proper manner, and that the inconveniences arising therefrom do not exceed the ordinary bounds of toleration imposed upon neighboring proprietors. Forget *v.* Laverdure, S. C. 1896, 9 Que. 98.

(2) 1 Guillouard 177, 178, 179; Caen, 25th Feb., 1885. *Rec. de Caen*, 85, p. 119; see Russell *v.* Clay, C. R. 1894, 6 Que. 62.

(3) 1 Guillouard 174 and 176; and see Pothier 81; and Art. 1660 C. Code. Considerable allowance must be made for local by-laws and usages which permit certain nuisances that would otherwise be unlawful, and for many other circumstances, all relating to the law of nuisance which cannot be treated at length in this work.

the landlord from his usual obligation towards his tenant in the event of a mere trespass or *voies de faits* by third parties, was adopted from *Pothier*, (1) who instances as examples of such trespass: where neighbors pasture their herds on the estate leased without claiming any right therein; where thieves at night time rob grape vines thereon; or when evil disposed persons throw poison in the pond with the view to poisoning the fish therein. These instances show what *Pothier* intended by *voies de faits*.

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CHAPTER III.

PRIVILEGE OF THE LANDLORD.

1. *In general.*
2. *What effects are subject to the privilege.*
3. *Removal of effects from the premises.*
   Right of the landlord to follow and attach in re-caption.
4. *Ranking of.*
5. *Extinction of.*

1. In General.

The landlord has, for the payment of his rent and *other obligations of the lease*, (1) a privileged right upon the moveable effects which are *found upon the property leased.* (2) This privilege cannot be exercised by the landlord himself; he must obtain the process of the Court, (3) unless there is a stipulation in the lease allowing the landlord to seize the effects furnishing the premises, without judicial proceedings; and even this agreement would only affect the immediate parties thereto, and not a third party to whom the effects had been transferred in good faith. (4) Nevertheless, it is a greater privilege than that accorded to the ordinary privileged creditor, for the landlord may seize before judgment the moveable effects subject to his privilege, without alleging any special cause, (5) and if the effects have been removed

(1) Langlois *v.* Rocque, C. Ct. 1882, 5 L. N. 156. Damages for not delivering over premises at expiration of lease.

(2) Art. 1619 Civil Code.

(3) Gagnon *v.* Hayes, C. Ct. 1864, 15 L. C. R. 170; Leblanc *v.* White, Mag. Ct. 1889, 13 L. N. 69; see Williams Mnf. Co. *v.* Willock, 13 L. N. 145.

(4) Fauteux *v.* Watters, Mag. Ct. 1889, 12 L. N. 275.

(5) Art. 1623 Civil Code, Art. 873 C. C. P.

from the premises without the landlord's consent, express or implied, he may follow them up and seize them within eight days after their removal. (1)

It is to be noted that Arts. 1619-1623 C. Code deal with privileged rights, but there are different kinds of these. Just as the unpaid vendor has two—1, A right to revendicate the thing; 2, A right of preference upon its price (2)—so the landlord has two distinct privileged rights: 1. The right to seize before judgment without affidavit all effects (with certain specified exceptions) found on the premises or even removed therefrom (with certain restrictions as to time), irrespective of their ownership, for the payment of his rent and *other obligations* of the lease; 2. A right of preference upon their price in the event of the other creditors laying a claim thereto, but the preference appears to be limited to claims for *rent* only. (3) Arts. 1619-1623 deal exclusively with the former; Arts. 1994 and 2005 deal exclusively with the latter; that is to say, with the right which a creditor has of being preferred to other creditors according to the origin of his claim. (4) By Art. 2005 C. Code the privilege of the landlord extends to rent that is due or to become due under a lease in authentic form. That this applies only in the event of competition with other creditors of the tenant is clear from the fact that it is limited to leases in authentic form, the privilege being much modified when the lease is not in authentic form. The reason is obvious; it would not be safe to accord a landlord a very extended privilege unless his lease were well authenticated as regards third parties, whereas a lease by private writing has practically the same effect between the parties thereto as a notarial one (5), and in their case the distinction would not be necessary.

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(1) Art. 1623 C. Code; Art. 873 C. C. P.; 4 Pothier, 265; 1 Pont *Priv.* 131
(2) Art. 1898 C. Code.
(3) See Arts. 1994 and 2005 C. Code.
(4) Art. 1983 C. Code.
(5) Art. 1222 C. Code.

At the first sight it would appear that the landlord is not accorded any rank for his privilege in respect to claims arising from obligations of the lease other than the payment of rent. Art. 1994 provides that the landlord shall rank eighth for his claim, and in accordance with Art. 2005. But Art. 2005 states that the privilege extends to *rent* due or to become due, and makes no mention of other obligations of the lease. This anomaly would appear to have arisen through a loose redaction of the Statute 49-50 Vic. Ch. 12. Originally Art. 1994, § 8, read thus in regard to the landlord's privilege: "The claim of the lessor." At that date Art. 2005 contained no provision for the case of insolvency, and upon the repeal of the Insolvent Acts, that article allowed the landlord an advantage over other creditors quite out of proportion to the necessities of the case. To amend this condition of affairs the Statute 49-50 Vic. Ch. 12 was passed providing that, in the case of the insolvency of the tenant, the landlord's privilege was to be reduced to much more reasonable proportions. And Art. 1994, § 8, was made to accord with Art. 2005 by adding the words " in accordance with the provisions of Art. 2005 C. Code."

The reason why Art. 2005 particularizes the case of rent is quite clear. Rent to become due is an unearned increment, and it would have been difficult for the Courts to allow the landlord to assert a privilege for a claim not yet earned and supposing the tenant not to be subject to Art. 1092 C. Code. It was also necessary to differentiate between notarial leases and leases by private writing. On the other hand, damages arising from a breach of obligation under the lease are merely an eventuality, and when they do arise are, and usually must be, liquidated by a judgment of the Court before they can rank against other creditors. Being so liquidated there could be no doubt as to their privilege. Seeing that there is no special legislation depriving a landlord of his privilege under Art. 1619 C. Code for the payment of "other obligations of the lease," we think it is reasonable to conclude that he

still ranks in that respect the same as formerly; and that Art. 1994, § 8, includes all that it did formerly, with the addition that, in respect to rent, reference must be made to Art. 2005 as amended.

The landlord's privilege is very extensive if the lease be a notarial one; in that case it extends to all rent that is due or to become due, with this proviso: that if the tenant, being a trader, becomes insolvent, and makes an abandonment in favor of his creditors, the landlord's privilege is restricted to the whole of the rent due and to become due during the current year, if there remain more than four months to complete the year; and if there remain less than four months to complete the year, to the whole of the rent due and to the rent becoming due during the current year and the whole of the following year. (1) If the tenant be not a trader, he cannot make an abandonment of his property for the benefit of his creditors; and if unable to pay his rent the landlord could exercise his option between having the lease cancelled and the tenant ejected, and demanding, in addition to rent due, an indemnity for the period required to relet; (2) or exercising his privilege for rent due and to become due during the period of his lease. But in the latter case, the landlord would have to show that he was exposed to loss of privilege for rent not yet due, such as a removal or attempt to remove effects from the premises, (3) and that sufficient effects are not or will not be left on the premises to guarantee the rent for the unexpired portion of the lease, including those of an under-tenant to the extent to which he is indebted to the principal tenant. (4) This would not give him the right to demand a money

(1) Art. 2005 C. Code.

(2) Art. 1637 C. Code. Here it is not a question of the privileges of Art. 2005, for that privilege implies the idea of being preferred to other creditors. Art. 1983 C. Code; 1 Pont *Privilèges* 126.

(3) Dufaux *v.* Morris, S. C. 1892, 2 Que. 500; Tracey *v.* Lazure, 10 L. C. J. 256; Houle *v.* Coderre, C. Ct. 1874, 18 L. C. J. 151; Lyman *v.* McDiarmid, S. C. 1883, 6 L. N. 162; Gadbois *v.* McPherson, S. C. 1895, 1 Rev. de Jur. 536; Healy *v.* Labelle, 3 L. C. J. 45; Williamson *v.* Depatie, Q. B. 1894, 4 Que. 202.

(4) Vinette *v.* Panneton, C. R. 1889, M. L. R., 5 S. C. 318; see Art. 873 C. C. P.

condemnation in advance for the whole of the unexpired period of the lease but simply to have the seizure declared good to the end of the lease, so that he can execute in the measure that each instalment of rent becomes due, unless the amount is sooner paid or the lease is cancelled ; and this applies to the case of the under-tenant. (1) Seizure of the effects by creditors would also give the landlord the right to exercise his privilege for rent to become due, by filing an opposition demanding that he be paid by privilege upon the proceeds of the sale of the effects. (2) For any balance remaining unsatisfied upon such proceeds, the landlord would have to rank as an ordinary creditor. The unexpired portion of the lease, for which the landlord has been paid in advance by privilege, becomes an asset which the tenant's creditors could realize on by virtue of Art. 1031 of our Code. (3) They could, therefore, dispose of that portion of the lease for their benefit unless there was a stipulation prohibiting sub-letting. In the latter event they would be entirely dependent upon the good-will of the landlord as to whether the unexpired portion of the lease could be realized upon. It was to avoid this anomalous position that the Code Napoleon gave the creditors the right to re-let the premises. (4) We have no such provision of the law, but if, the premises being vacant, the landlord should succeed in re-letting them, the creditors would have a right to that portion of the rent which exceeds the amount of the landlord's unsatisfied privilege, if any. (5)

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(1) Simmons *v.* Gravel, C. Ct. (Que.), 13 Q. L. R. 263 ; Sansfaçon *v.* Boucher, C. Ct. 1886, 6 Q. L. R. 384 ; Joseph *v.* Smith, S. C. 1880, 3 L. N 115 ; Catudal *v.* Cool, S. C. 1891, 21 R. L. 494 ; and see Williamson *v.* Dépatie, Q. B. 1894, 4 Que. 202.

(2) Art. 582 C. P. C.

(3) See 19 Duranton, p. 117, Note 1 ; 29 Laurent 402.

(4) 19 Duranton, p. 117, Note 1.

(5) By analogy, 1 Pont *Privileges* 128.

" L'esprit ne concevant aucune situation dans laquelle il puisse être admis que le bailleur ait à la fois la chose et le prix, la jouissance de l'immeuble et les loyers ou fermages."

If the lease be not in notarial form, the privilege can only be claimed for three overdue instalments and for the remainder of the current year. (1)

2. What Effects are Subject to the Privilege.

In the lease of houses the privileged right includes the furniture and moveable effects of the tenant, (2) and if the lease be of a store, shop or manufactory, the merchandise contained in it. (3) But the merchandise can only be seized while it continues to be the property of the tenant. (4)

In regard to the question whether promissory notes, and the like, are subject to the landlord's privilege, it is to be noted that by Art. 1620 C. Code, the landlord's privilege extends to the furniture and *moveable effects* of the tenant. This is more extensive than the corresponding Art. of the Code Napoleon (2102) which limits the privilege to goods which "furnish" the premises. The Louisiana Code (Art. 2705) has the same provision as ours, and it has been there held that the landlord's privilege extends to promissory notes that are the property of the tenant, and found on the leased premises. (5) It has also been there held that there was no good reason why the assets of a banker so far as they are susceptible of being pledged should not be subjected to the same privilege as merchandise in a store. (6) But we do not think our Courts would go so far as this, for *Pothier* says that such paper only represents the credit of which it is the evi-

(1) Art. 2005.

(2) As to what furniture the tenant is bound to keep on the premises, and what he may remove. See *infra*, "Obligations of the Tenant."

(3) Art. 1620 C. Code.

(4) Art. 1523 C. Code.

(5) Succession of Stone *v.* Creditors, Supreme Ct. Louisiana, 31 La. Ann. 311. In Mathews *v.* Creditors, 10 Louisiana Annual Reports, 718, it was held that the clause which confers the privilege is absolute and unambiguous, and the words "moveable effects" were too comprehensive to admit of doubt or discussion with reference to their application, and that the concluding clause of the article appears rather illustrative than restrictive in its character.

(6) Mathews *v.* Creditors, 10 L. Ann. 718; see also Bazin *v.* Segura, 5 La. Ann. 718, as to difference between French Code and Louisiana Code, and favoring a wider interpretation than the former.

dence; the credit itself is an incorporeal thing which cannot be said to be on the premises. (1) And the same might be said of insurance policies. But jewelry and the like would be subject to the privilege. (2)

It has been said that the landlord's privilege exists upon the moveable effects which are found upon the property leased. (3) This provision of law is based upon the very strict (4) presumption, that the effects furnishing the premises of the tenant are the latter's property. (5) As an exception to this rule, the Code declares that the effects of the under-tenant are only subject to this privilege, in so far as he is indebted to the principal tenant. (6) The goods of all other parties which are found on the premises are subject to the privilege excepting where they are proved to be only *transiently* or *accidentally* on the premises, as the baggage of a traveller in an inn, or articles sent to a workman to be repaired, or to an auctioneer to be sold, or where they are stolen or are taken on the premises against the *express* wish of their owner. (7)

The following are instances of the interpretation the Courts have put upon the meaning of the words "transiently or accidentally."

C. purchased an agricultural implement from G., a dealer in such things, with the understanding that it should be removed without delay. Shortly after the sale, C. went for it, but in consequence of snow having fallen and ice formed about the instrument, it was feared that it might be injured by the cutting of it out, and it was allowed to remain until spring—some months—when it was seized for rent due by

(1) 4 *Louage*, 251; and see Art. 398 C. Code.

(2) *Ib.* 248.

(3) *Supra* p. 54; Art. 1619 C. Code.

(4) See Art. 1622.

(5) Bruneau *v.* Berthiaume, Mag. Ct. 1890, 13 L. N. 322; Eastty *v.* Fabrique of Montreal, Q. B. 1867, 17 L. C. R. 418, 12 L. C. J. 11.

(6) Art. 1621. As to the meaning of the word "indebtedness" as here used, see *infra*, p. 58.

(7) Art. 1622 C. Code; see 1 Pont 122.

G. The Court held, that, under the circumstances, it was transiently and accidentally on the premises, and not subject to the landlord's privilege. (1)

The landlord's privilege does not extend to a piano stored with the tenant, a piano dealer, by a third party, and the enumeration of articles in Art. 1622 Civil Code as exempt from seizure is only illustrative and not limitative. (2) Nor does the privilege extend to a piano temporarily placed in a concert room for an evening concert; (3) nor goods temporarily deposited in that part of a store leased as a bonded warehouse, (4) or goods temporarily stored in an ordinary warehouse; (5) nor deals manufactured for saw-logs and sent to a mill to be sawn; (6) nor to horses in the possession of a tenant and owned by a third party, if the landlord had notice that the tenant was not proprietor of the horse; (7) nor to horses stabled at an hotel by a horse dealer; (8) nor the effects of boarders boarding with the tenant, provided, at the moment of moving in, they notified the landlord that the effects belonged to them and not the tenant, (9) and provided also that they do not furnish their own apartments, for in that case they would be considered as sub-tenants, and subject to the law applicable to them. (10)

But horses and vehicles on the premises leased, which were continuously in the possession of the husband of the tenant, though they were used by him in travelling most of the time,

(1) McGreevy *v.* Gingras, S. C. 1877, 3 Q. L. R. 196. Reversed in Review on points of procedure, 4 Q. L. R. 203.

(2) Ireland *v.* Henry, Q. B. 1876, 20 L. C. J. 327.

(3) Pearce *v.* Mayor of Montreal, 1859, 3 L. C. J. 122; Brown *v.* Hogan, S. C. 1854, 4 L. C. R. 414.

(4) Eastty *v.* Fabrique of Montreal, Q. B. 1867, 17 L. C. R. 418, 12 L. C. J. 11.

(5) Renaud *v.* Hood, Q. B. 1868, 12 L. C. J. 197.

(6) Price *v.* Hall, Q. B. 1876, 2 Q. L. R. 88, 10 R. L. 120.

(7) Sheridan *v.* Tolan, S. C. 1882, 5 L. N. 298; and see Vallière *v.* Bagley, K. B. 1820, 2 R. de L. 440.

(8) Delvecchio *v.* Lesage, S. C. 1879, 2 L. N. 251.

(9) Bruneau *v.* Berthiaume, Mag. Ct. 1890, 13 L. N. 322; Clarke *v.* State, S. C. 1892, 2 Que. 433.

(10) Aimong *v.* Cassidy, S. C. 1888, 16 R. L. at p. 459. See *infra*, p. 58 *et seq.*

are subject to the privilege; (1) also a cart voluntarily left in the possession of a tenant by a third party during several months, provided that the landlord had no knowlege that the tenant was not the proprietor of the cart; (2) also goods stored for deposit and sale on a wharf; (3) also moveables seized and sold by authority of justice at the instance of the landlord, and left by the purchaser in the house where they are so seized and sold. (4) It is otherwise where the privilege sought to be exercised over said goods relates to rent which became due before the judicial sale. (5) The landlord's privilege for rent due before the date of the sale is converted into a privilege upon the proceeds of the goods sold, and they could not be sold twice for the same debt. (6)

If a third party, owner of goods about to come into the possesion of the tenant, notifies the landlord, before or during the placing of the goods on the leased premises, that these effects are his property, they will not be subject to the landlord's privilege for the period of the lease; provided always that the landlord does not refuse to renounce his privilege on such effects. (7) But it is clear that nothing short of a written express renunciation by the landlord will be of much service to the third party, (8) and a renunciation does not extend to the continuation of the lease or to a new lease of the effects by the third party to the tenant. (9) If the landlord should

(1) Thomas *v.* Coombe, C. R. 1883, 7 L. N. 77.
(2) Beaudry *v.* Lafleur, C. R. 1880, 24 L. C. J. 150.
(3) Jones *v.* Anderson, Q. B. 1852, 2 L. C. R. 154; Jones *v.* Lemesurier, Q. B. 1840, 2 R. de L. 317. Goods of a third person in a leased store consigned to be sold at a fixed price are liable for rent. (Goodrich *v.* Bodley, 35 Louisiana Annual 525.)
(4) Léveillé *v.* Labelle, S. C. 1871, 16 L. C. J. 54. Moveables seized and sold by authority of justice, and left in the house where they are so seized and sold, will, nevertheless, remain liable for the rent due to the landlord of the house. Léveillé *v.* Labelle, S. C. 1871, 16 L. C. J. 54.
(5) Vineberg *v.* Barton, S. C. 1895, 7 Que. 448.
(6) *Ibid.*
(7) Claxton *v.* Glover, C. R. 1894, 6 Que. 227, confirming S. C.; see Vallière *v.* Carrier, 6 Que. 1.
(8) *Ibid.* at p. 230.
(9) Shaw *v.* Messier, S. C. 1894, 5 Que. 468.

refuse to forego his privilege, the owner of such effects must remove them to avoid their becoming subject to it. (1)

But a mere notice given to the landlord during the currency of the lease, by a third party, that certain goods owned by him have been placed on the premises leased, will not avail to exempt such goods from the landlord's privilege; nothing short of an *express* waiver in writing by the latter, of his rights, will serve to release the goods therefrom. (2) If the lease has more than one year to run, the fact that the landlord takes his attachment for one year's rent only, and limits the conclusions of his declaration to that year, operates to restrict his privilege to that period upon the effects of third parties, which may be on the premises. (3)

If the landlord expressly renounces his right to seize the property of a third party on the premises leased by him, this renunciation is for the protection of the third party, and could not be made use of by the tenant for his advantage. (4)

If the effects of a third party are taken into the leased premises against the express wish of their owner, they will not be subject to the landlord's privilege. (5)

The effects of the under-tenant are liable to be seized only in so far as he is indebted to the principal tenant, (6) which means that the under-tenant's effects are liable to the landlord's privilege for the amount due for the whole term of the under-tenant's lease, less what he may already have paid thereon. (7)

(1) Claxton *v.* Glover, *supra.*

(2) Vallière *v.* Carrière, S. C. 1894, 6 Que. 1, confirmed in Review 30th June, 1894; Claxton *v.* Glover, C. R. 1894, 6 Que. 227.

(3) Vallière *v.* Carrière, *supra.*

(4) Corse *v.* Hudson, C. R. 1880, 3 L. N. 78; 2 L. N. 260.

(5) See Art. 1622.

(6) Arts. 1621, 1639 C. Code.

(7) Vinette *v.* Panneton, C. R. 1889, M. L. R., 5 S. C. 318. The expression "for the amount only of the rent which he may owe," used in Art. 1639, is a very poor translation of the French "que jusqu'à concurrence du *prix de la location* dont il peut être débiteur," etc. The same error has crept into the Code of Louisiana, and given rise to the interpretation that it is the rent due by the tenant, and demandable by the principal tenant, and not rent which is to become due. Thus it was held that "The goods of a sub-lessee, on the leased premises, are only liable to seizure for rent past due." Sanarens *v.* True (22 Louisiana Annual 182, C. Code, Art. 2676). The true meaning of our article can be ascertained from Art. 162 Custom of Paris: "S'il y a des sous-locatifs, peuvent être pris leurs biens pour le dit loyer et charges du bail; et néanmoins leur seront rendus en payant le loyer pour leur *occupation*."

Where by the lease the tenant is forbidden to sublet, an under-tenant is toward the proprietor in the position of a third party whose effects have been deposited on the property leased with his consent, and consequently his effects will be liable for the whole rent due by the original tenant and for other obligations of the lease ; (1) excepting those goods which, by the Code of Procedure, Art. 556, are made exempt from seizure. (2)

If the landlord has the lease of the principal tenant cancelled, because the latter has sublet without his consent and against the prohibition in the lease, the landlord can still retain and exercise his privilege upon the effects of the under-tenant, the principal tenant having left the premises with his effects, and have the attachment declared good (*tenante*) for rent to become due until the expiration of the period of the lease. (3) But if the landlord, in such case, should choose not to exercise his right to have the lease cancelled, he would not have the right to sue out an attachment for rent not due, where sufficient effects belonging to the principal tenant and under-tenant are left on the premises to guarantee the rent. (4)

The sub-tenant cannot set up payments made in advance to the principal tenant, unless made by virtue of a stipulation in the lease, or in accordance with the usage of the place. (5)

It would appear that Arts. 1621, 1639 Civil Code, which

(1) Arnoldi *v.* Grimard, C. Ct. 1874, 5 R. L. 748 ; Smith *v.* Leclaire, S. C. 1879 ; Sœurs de la Charité, etc., *v.* Yuile, Q. B. 1875, 20 L. C. J. 329 ; Lampson *v.* Nesbitt, C. Ct. 1863, 13 L. C. R. 365 ; Boyer *v.* McIver, S. C. 1877, 21 L. C. J. 160. Confirmed in Review, 22 L. C. J. 104 ; but the attachment will be declared "tenante" only. Catudal *v.* Cool, S. C. 1891, 21 R. L. 494.

The goods of a third person contained in the leased house by his consent, under an agreement with the lessee, that no rent or other consideration was to be paid for the occupancy, are not the goods of an "under-tenant" and are affected by the landlord's privilege (University Publishing Co. *v.* Piffet, 34 Louisiana Annual 602) ; but where such persons occupy a definite portion of the house free of rent, the furniture, etc., will be held liable for the principal tenant's rent in proportion to the part of the house occupied by them (4 Pothier 236).

(2) See *infra*, p. 62.

(3) Catudal *v.* Cool, S. C. 1891, 21 R. L. 494.

(4) Vinette *v.* Panneton, S. C. 1889, M. L. R., 5 S. C. 318.

(5) Art. 1639 C. Code ; Wilson *v.* Pariseau, S. C. 1856, 6 L. C. R. 196.

limit the liability of the under-tenant's effects for the landlord's privilege to the amount in which he is indebted to the principal tenant, are not applicable to the case where the principal tenant wholly assigns his lease to a sub-tenant for a less rent than he himself agreed to pay. In this case the sub-tenant's effects would be liable for the whole of the rent due and to become due equally as if he were the principal tenant.(1)

Certain effects of householders are rendered absolutely exempt from seizure whether for the claim of the landlord (2) or for any other claims, privileged or otherwise, (3) with the exception hereafter stated, viz.:

1. The bed, bedding or bedsteads in use by the *debtor* and his family.
2. The ordinary and necessary wearing apparel of himself and his family.
3. Two stoves and their pipes, one pair of andirons, one pot hook and its accessories, one pair of tongs and one fire shovel.
4. All the cooking utensils, knives, forks, spoons and crockery in use by the family, two tables, two cupboards or dressers, one lamp, one mirror, one washing stand with its toilet accessories, two trunks or valises, the carpets or matting covering the floors, one clock, one sofa, twelve chairs, *provided that the total value of such effects does not exceed the sum of fifty dollars; the debtor having in case of seizure the right to choose the things that he may retain to the amount of the said sum.*
5. All spinning wheels and weaving looms in domestic use, one axe, one saw, one gun, six traps, such fishing nets, lines and seines as are in common use, one

(1) Wilson *v.* Pariseau, S. C. 1856, 6 L. C. R. 196; Lampson *v.* Nesbitt, C. Ct. 1863, 13 L. C. R. 365. Both decided under Art. 162 Custom of Paris. See Ferrière, Coutume de Paris, vol. 2, p. 1063, No. 16.

(2) Michon *v.* Venne, C. R. 1886, M. L. R., 2 S. C. 367.

(3) Arts. 556, 557, 558, C. C. P., as amended to date.

tub, one washing machine, one wringer, two pails, three flat irons, one blacking brush, one broom, and fifty volumes of books, all the family portraits and all drawings and paintings executed by the debtor or the members of his family for their use.

6. One sewing machine. (1)
7. Fuel and food sufficient for the debtor and his family for three months.
8. One span of plough horses or a yoke of oxen, one horse, one summer vehicle and one winter vehicle, and the harness used by a carter or driver for earning his livelihood, one cow, two pigs, four sheep, the wool from such sheep, the cloth manufactured from such wool, and the hay and other fodder intended for feeding the said animals; further, the following agricultural tools and implements: one plough, one harrow, one working sleigh, one tumbril, one hay-cart with its wheels, and all harness necessary and intended for farming purposes.
9. Tools and implements or other chattels ordinarily used in his trade to the value of thirty dollars. (2)
10. Bees to the extent of fifteen hives.

Nevertheless, the things and effects mentioned in paragraphs four, five and six are not exempt from seizure and sale when the suit is to recover the price of their purchase, or they have been given in pawn. (3)

The law requires that the debtor shall make his choice, at the time of seizure, of those effects enumerated above (as, for instance, tools of trade up to the value of $30) for which he claims exemption up to the stated limit. (4) But the

(1) By Statute 53 Vic., ch. 58, the former provision, that such sewing machine could only be exempted where it was used for the purpose of earning a livelihood has been omitted, thus rendering the exemption unconditional.

(2) A pastry oven is an implement of a confectioner's trade, and therefore exempt from seizure. Roy *v.* Lefebvre, S. C. 1894, 6 Que. 485.

(3) Art. 556 C. C. P.

(4) Art. 556 C. C. P.; Ross *v.* Lemieux, S. C. 1886, M. L. R., 2 S. C. 272; Art. 581 C. C. P.

bailiff must also offer to the person whose effects are seized his choice in this respect. (1)

The goods of third parties found on the tenant's premises with their consent are also subject to the exemption above enumerated. (2)

The sale of the effects seized must not proceed beyond the amount necessary to pay the debt in principal, interest and costs; to this end the tenant has a right to determine the order in which the effects are to be put up for sale. It is doubtful whether a third party can exercise this right. (3)

As to the renunciation by the tenant of the exemption declared in his favor, the better opinion is that he cannot validly do so, and a clause to that effect in the lease will be considered as immoral and contrary to the best public interests. (4)

Books of account, titles of debt, or other papers in the possession of the debtor, are exempt from seizure. (5) But not debentures, promissory notes or other documents of commercial value. (6)

3. Removal of Effects from Premises; Right of Landlord to follow them (*Saisie Gagerie par droit de suite*).

The landlord may follow and seize in recaption, even for amounts not yet payable, the moveables and effects which were in the house or premises leased (except merchandise when sold), when they have been removed without his consent; but he must do so within *eight days* after their removal; and the moveables and effects mentioned in Article 556 must be subtracted from the sale. If the effects have been

(1) Lanthier *v.* Thouin, C. Ct. 1892, 2 Que. 157.

(2) Herron *v.* Brunette, S. C. 1894, 6 Que. 318; Brophy *v.* Fitch, C. R. 1895, 7 Que. 173; Jones *v.* Albert, S. C. 1877, 7 L. N. 277; *Contra* Bélanger *v.* Roy, S. C. 1879, 2 L. N. 378; Bartel *v.* Desroches, S. C. 1893, 4 Que. 60

(3) Art. 595 C. C. P.; Mallette *v.* Patenaude, S. C. 1895, 2 Rev. de Jur. 1 affirmative; *Contra* Langhoff *v.* Boyer, S. C. 1895, 9 Que. 216.

(4) Brodeur *v.* Rogers, C. Ct. 1885, 30 L. C. J. 2. This is a well considered case; *Contra* Robitaille *v.* Bolduc, C. Ct. 1878, 4 Q. L. R. 179.

(5) Art. 557 C. C. P.

(6) Art. 565 C. C. P.

removed to furnish new premises, the attachment in recaption must be served upon the new landlord, who must also be summoned to show cause against its execution. (1) In regard to rent to become due, the landlord, unless he demand the resiliation of the lease, cannot realize a money payment in advance by having the goods seized in recaption sold at bailiff's sale; the court will pronounce judgment condemning the defendant to pay without delay the rent due, and that to become due must be paid at the proper periods; and the attachment in recaption will be declared *tenante* until the judgment is declared entirely satisfied. (2) If the effects belonging to a third party are removed by him from the leased premises, the landlord can revendicate them within eight days, without bringing the tenant into the action. (3) If the goods cannot be found, their owner will be ordered to restore them to the premises from which they were taken, or pay the value thereof to the landlord. (4) The landlord's right to follow by *saisie-gagerie par droit de suite* the effects which have been removed from his leased premises is absolutely extinguished after the expiration of the eighth day from their removal, even if they have been fraudulently given in pledge to a third party by the tenant, and even as against the tenant. (5) Where the tenant transfers his stock in trade, while notoriously insolvent, to one of his creditors who is aware of his insolvency, the landlord may, within eight days, attach by garnishment the stock transferred to the creditor. (6)

But a landlord is not always obliged to follow the effects

(1) Art. 873 C. P. C., Art. 1623 C. Code.

(2) Simmons *v.* Gravel, C. Ct. (Que.), 13 Q. L. R. 263; Sansfaçon *v.* Boucher, C. Ct. 1886, 6 Q. L. R. 384; Joseph *v.* Smith, S. C. 1880, 3 L. N. 115; Catudal *v.* Cool, S. C. 1891, 21 R. L. 494.

(3) Auld *v.* Laurent, Q. B. 1864, 8 L. C. J. 146; reversing C. Ct., 7 L. C. J. 49. Chief Justice Lafontaine was in favor of the judgment in appeal, but died before it was delivered. (See 8 L. C. J. at p. 152.)

(4) *Ibid.*

(5) Cuddy *v.* Kamm, S. C. 1895, 9 Que. 32; Williams Mfg. Co. *v.* Willock, C. Ct. 1880, 13 L. N. 145; Leveillé *v.* Couillard, C. Ct. 1886, 14 R. L. 653; *Contra*, Thouin *v.* Rosaire, 7 L. N. 287.

(6) Lyman *v.* McDiarmid, S. C. 1883, 6 L. N. 162.

of a tenant removed by the latter from the premises, in order to secure his rights. The remedy of *capias* is open to him; for instance, where a tenant has removed his effects at night time, and refuses to divulge their present location or to pay his claim; (1) or having discovered where the goods have been removed to, he can, in addition to the capias, take an attachment by garnishment in the hands of the party having possession of the goods. (2) Where a tenant has removed his effects from the premises leased, on account of their becoming uninhabitable by fire, an attachment before judgment in the hands of the auctioneer, to whom the effects have been taken to be sold on account of damage thereto by the fire, will not lie. (3)

The mere fact that a tenant is indebted to his landlord for rent will not prevent him from selling the effects in the premises to a third party. Such sale is, however, subject to the landlord's right of recaption within eight days, and in order to vitiate the sale the right must not only be exercised to the extent of seizing the removed effects, but it must be prosecuted to judgment. (4)

The privilege of the landlord subsists so long as there has been no displacement of the moveable effects subject to it, or no removal of them out of his possession, and for eight days after such displacement or removal. It subsists on effects which the landlord, with the consent of the outgoing tenant, takes into his own possession as security for the amount due for rent. (5) But if, instead of keeping the effects in his own possession, they are deposited in the hands of a third party, with the written understanding that the landlord shall be

(1) Mitcheson *v.* Burnett, S. C. 1892, 2 Que. 260; St. Michel *v.* Vidler, S. C. 1885, M. L. R., 1 S. C. 163; Cowans *v.* Brière, C. R. 1889, 33 L. C. J. 103.

(2) St. Michel *v.* Vidler, *supra.*

(3) Perrault *v.* Tite, C. R. 1896, 9 Que. 260.

(4) Archibald *v.* Shaw, C. Ct. 1869, 14 L. C. J. 277; confirmed in Review 28th June, 1870.

(5) Williams Manufacturing Co. *v.* Willock, C. Ct. 1890, 13 L. N. 145.

allowed to exercise his privilege thereon after the expiration of eight days, this agreement will not hold as against an intervening party owner of the effects when they are seized after the expiration of eight days. (1)

If a tenant, pending a seizure of his furniture for rent, removes what is so seized to other lodgings, the new landlord acquires no privilege to the prejudice of the former landlord, (2) excepting where the latter fails to follow and attach in recaption within eight days the furniture so removed, and proceeds to sale within two months (3) of the date of the judgment on the first seizure. (4)

4. Ranking of the Landlord's Privilege.

The landlord cannot oppose the seizure and sale of the immoveables subject to his claim; he can only exercise his privilege upon the proceeds of the sale. (5) Where the effects have been seized and sold according to law, the bailiff may, after deducting costs, etc., pay over the amount realized to the creditor making the seizure; but if the landlord places an opposition in his hands, he must return the funds into Court, to await its final judgment as to the distribution. The landlord has a right to be paid in preference to all other ordinary creditors, saving the right of a prior seizing party for his *costs*, the case of the insolvency of the tenant and the case of privileged claims. (6)

The following privileges are superior to that of the landlord:—

1. Law costs and all expenses incurred in the interest of

(1) Hearn *v.* Vezina, C. Ct. 1880, 6 Q. L. R. 93.

(2) Gagnon *v.* McLeish, K. B. 1811, 2 R. de L. 440.

(3) Art. 172 Custom of Paris.

(4) Johnson *v.* Bonner, Q. B. 1857, 1 L. C. J. 116, 7 L. C. R. 80; reversing S. C., 6 L. C. R. 42. *Contra* Chaussé *v.* Christin, C. Ct. 1893, 3 Que. 40. This case seems to have been based principally upon Bonner *v.* Hamilton, but this was reversed by the Q. B. *sub nom.* Johnson *v.* Bonner, *supra.* In view of the reasons given in Johnson *v.* Bonner, Chaussé *v.* Christin can hardly be viewed as correct.

(5) Voyer *v.* Pichet, Prev. de Québec 1728, Perrault's Prevosté p. 10.

(6) Arts. 601, 602 C. P. C.

the mass of the creditors. (1) But only such costs as are incurred in the Court of first instance. (2) When the suit has been against a firm, the plaintiff's privilege for costs has priority even as regards the personal effects of the individual members of the firm, over the lien of the landlord for rent of premises leased to such members. (3) The above law costs and expenses do not include the curator's costs where the abandonment is made after the landlord's attachment, (4) or where, being made before the attachment, the curator had not then taken possession ; the landlord's privilege is superior to such costs. (5)

2. Tithes. (6) (These only affect farm leases.)

3. The claims of the vendor. (7) But they only take precedence of the landlord's claim where the goods are sold for cash, and then only within eight days after the sale, or, in case of insolvency, thirty days. (8)

4. The claims of creditors who have a right of pledge or retention, (9) provided their right is still subsisting, or could have been claimed at the time of the seizure. (10)

5. Funeral expenses, (11) which include only what is suitable to the station and means of the deceased, including the mourning of the widow. (12)

(1) Arts. 1994, 1995 C. Code ; Art. 606 C. C. P.

(2) Beaudry *v.* Dunlop & Lyman, Q. B. 1887, M. L. R., 3 Q. B. 278.

(3) *Ib.*

(4) De Bellefeuille *v.* Desmarteau, Q. B. 1887, M. L. R., 3 Q. B. 303, 31 L. C. J. 301, 15 R. L. 544.

(5) McWilliam *v.* Osler, S. C. 1892, 2 Que. 126.

(6) Arts. 1994, 1997 C. Code.

(7) Arts. 1994, 20000 C. Code.

(8) Arts. 1998 as amended to date, 1999, 2000 C. Code. The lessor's privilege upon moveables garnishing the leased premises is superior to that of the unpaid vendor of such moveables. So the latter, who is also lessor, cannot apply to the payment of his unpaid claim the proceeds of sale of such moveables garnishing leased premises, to the detriment of a third party whose effects are also upon the premises leased, and would, in case of non-payment of the rent, become liable therefor. Vallière *v.* Carrier, S. C. 1894, 6 Que. 1, confirmed in Review 30th June, 1894.

(9) Art. 1994 C. Code, Art. 610 C. C. P.

(10) Art. 2001 C. Code.

(11) Art. 1994 C. Code.

(12) Art. 2002 C. Code.

6. The expenses of the last illness, (1) which include the charges of the physicians, apothecaries and nurses during the illness of which the debtor died. In cases of chronic disease the privilege avails only for the expenses during the last six months before the decease. (2)

7. Municipal taxes. (3)

The Crown has a preference over all other creditors upon the proceeds of execution against moveable property, which, under particular statutes, is subject to any of the following duties: customs dues; excise duties; duties imposed upon timber cut; tolls; inspection dues on vessels, railways or other similar. (4) But where goods are confiscated for contravention of the revenue laws, or for crime, the landlord still retains his privilege for rent thereon. (5)

After the above, the landlord's privilege being next satisfied, the following privileged claims must be paid out before he can rank *pro ratâ* with the ordinary creditors upon any balance that may remain due to him.

1. Servants' wages upon all the moveable property of the tenant, for a period not exceeding one year previous to the time of the seizure or of the death. Clerks, apprentices and journeymen are entitled to the same preference, but only upon the merchandise and effects contained in the store, shop or workshop, in which their services were required (for a period of arrears not exceeding three months). Those who have supplied provisions have likewise a privilege, concurrently with domestic servants and hired persons, for the supplies furnished during the last twelve months. (6)

2. The claims of the Crown against persons accountable for its moneys.

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(1) Art. 1994 C. Code.

(2) Art. 2003 C. Code.

(3) Arts. 1994, 2004 C. Code.

(4) Art. 607 C. C. P., Art. 1989 C. Code.

(5) Rasconi *v.* Poupart, S. C. 1892, 1 Que. 307; Dumphy *v.* Kehoe, S. C. 1891, 21 R. L. 119.

(6) Arts. 1994, 2006 C. Code.

5. Extinction of the Privilege.

So long as the landlord retains possession of the effects of his tenant which are subject to his claim for rent, the privilege subsists, even where the lease has expired. (1) If the effects have been displaced, or removed from the landlord's possession, *whether fraudulently or otherwise*, the privilege will become absolutely extinct after the eighth day from their removal, whether the effects are in the tenant's possession or in the possession of a third party. (2) It will also become extinct, at least as regards third parties, where the landlord, having taken the attachment, fails to proceed to judgment, (3) or where, having obtained judgment, he fails to sell the goods within two months thereafter, unless the judgment was declared *tenante* for rent to become due. (4) Express renunciation of the privilege by the landlord will also extinguish it, but only for the period of the lease; it will revive upon continuation. (5) The privilege ceases where the effects subject to it are destroyed by fire; consequently it will not extend to the insurance on such effects. (6)

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(1) Williams Manufacturing Co. *v.* Willock, C. Ct. 1890, 13 L. N. 145.

(2) *Ib.*; and Cuddy *v.* Kamm, S. C. 1895, 9 Que. 32.

(3) Archibald *v.* Shaw, C. Ct. 1869, 14 L. C. J. 277.

(4) Art. 172 Custom of Paris; Johnson *v.* Bonner, Q. B. 1857; 1 L. C. J. 116, 7 L. C. R. 80, reversing S. C., 6 L. C. R. 42.

(5) Shaw *v.* Messier, S. C. 1894, 5 Que. 468.

(6) Wood *v.* Lamoureux, S. C. 1885, 15 R. L. 313; Voscelles *v.* Laurier, S. C. 1895, 8 Que. 404.

CHAPTER IV.

OBLIGATIONS OF THE TENANT.

1. *To furnish the premises leased.*
2. *To use the premises leased as a prudent administrator, etc.*
3. *To make certain lesser repairs.*
4. *To pay the rent and other charges.*
5. *To preserve the premises and restore them in the condition in which he received them.*
   (1) General obligations.
   (2) Special obligation in the case of Destruction by fire.

1. To Furnish the Premises Leased.

The landlord has a right to have the lease rescinded when the tenant fails to furnish the premises leased, if a house, with sufficient furniture or moveable effects, unless other security be given. (1) It has been a question of some little difficulty to determine what is "sufficient furniture," etc., under the circumstances.

In the first place, it is certain that the tenant is not bound to retain more furniture than is sufficient to cover the amount of his liability for rent under the lease; any surplus he can remove or dispose of. (2) Local usage, where any exists, should govern the nature and quantity of effects that must be brought into the premises as security for the rent; (3) also the profession of the tenant and the use for which the premises are intended. (4)

In the absence of a local usage and of other particular circumstances, the better opinion is that the landlord can only

(1) Art. 1624 C. Code, § 1.

(2) Black *v.* Edwards, C. R. 1885, 29 L. C. J. 246; Donohue *v.* De la Bigne, C. Ct. 1896, 2 Rev. de Jurisprudence 132; Vinet *v.* Panneton, M. L. R., 5 S. C. at p. 322; and see Zeigler *v.* McMahon, 1 Rev. de Leg. 95; Pothier, 268; 1 Guillouard 465; 25 Laurent 425; 4 Duvergier, Nos. 17 and 18.

(3) Pothier 318; 2 Guillouard 461.

(4) 2 Guillouard 461; 6 Boileux, p. 105; Lynch *v.* Reeves, M. L. R., 5 S. C. 23, 15 R. L. 148.

exact that the premises be furnished with sufficient moveables to guarantee one year's rent and costs of seizure and sale, whether the lease be for one year or more. (1) And if the lease be for a year, and part of the rent has been paid, the furniture on the premises need only suffice to cover the rent due for the balance of the year. (2)

In valuing the effects furnishing the premises, for the above purpose, those which are by law (3) exempt from seizure should not be included, nor those which undoubtedly belong to a third party, whether by reason that the landlord has been notified to that effect by their owner, or that it is a matter of public knowledge. (4) If the house leased be a furnished one, the landlord should stipulate in the lease for some security or payment of rent in advance, for in the absence of such stipulation he cannot fall back on Art. 1624 C. Code. (5)

2. Obligation of the Tenant to use the Thing Leased as a Prudent Administrator, etc.

The tenant is obliged to use the premises as a prudent administrator, for the purposes only for which they are designed, and according to the terms and intention of the lease. (6) The obligation to use the premises as a prudent administrator means, in one sense, that the tenant must bring the same amount of care to their use and *preservation* that a prudent person would if the property were his own ; (7)

(1) 2 Guillouard 462 ; 4 Duvergier 16 ; Merlin Rep. vo. *Bail*, § vii., No. 3 ; Desloriers *v.* Lambert, C. Ct. 1875, 1 Q. L. R. 365 ; Longpré *v.* Cardinal, S. C. 1886, M. L. R., 5 S. C. 28, confirmed in Review 31st Jan., 1887 ; Donohue *v.* de la Bigne C. Ct. 1896, 2 Rev. de Jurisprudence 132 ; and see Lynch *v.* Reeves, C. R. 1886, M. L. R., 5 S. C. 23, 15 R. L. 148 ; Gareau *v.* Pacquet, C. Ct. 1870, 14 L. C. J. 267.

(2) Desloriers *v.* Lambert, C. Ct. 1875, 1 Q. L. R. 365 ; Longpré *v.* Cardinal, S. C. 1886, M. L. R., 5 S. C. 28 ; confirmed in Review, 31st Jan., 1887.

(3) Arts. 556, 558 C. C. P.

(4) 1 Guillouard 463 ; but see *supra*, p. 55, as to landlord's privilege on goods of third parties on the premises with their consent express or implied.

(5) 1 Guillouard 464.

(6) Art. 1626 C. Code.

(7) See Pothier No. 190.

and in another sense that he must not cause any unlawful disturbance to other tenants, if any, on the premises. (1) In the case of unlawful disturbance by a tenant, the landlord's responsibility therefor will only arise where the injured party is a co-tenant, (2) and not merely a neighbor, (3) unless such disturbance were authorized by the lease. (4)

The tenant is obliged to occupy the premises leased by him, either personally or by his representatives,—that is to say, they must be kept open, ventilated, heated and guarded. (5) Breach of this and the foregoing obligations will be a ground for resiliation of the lease, even where the tenant tenders the rent. (6) If the premises be devoted to purposes of commerce, the tenant may even be obliged to *exercise* therein the particular commerce for which they were leased, for if they were closed up, their value might be decreased by the loss of the good-will which had formerly attached to them in a particular capacity ; provided always that such good-will had so attached. (7)

If the premises are, to the knowledge of the tenant, old and in bad condition at the moment of his acceptance of them, he has only himself to blame if, by putting in machinery which they are unfitted to support, they get into such a condition that he is no longer able to carry on his industry therein. (8)

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(1) 1 Guillouard 191 ; Bordeaux, 25th Aug., 1836 ; Dalloz Rep. vo. *Louage*, No. 286, 2°. Where one of several tenants painted the entire front of the leased building a conspicuous red color, and the defendant, who leased the upper flats, and to whom this color was offensive, covered over the red with a neutral tint, —*Held*, that the landlord had no ground of rescission against the latter on account of the change. Deguire *v.* Marchand, C. R. 1878, 1 L. N. 326.

(2) See *supra*, p. 36 ; 1 Guillouard 192 ; and see Attorney Gen. *v.* Coté, 3 Q. L. R. 235.

(3) Dufour *v.* Roy, Q. B. 1885, 11 Q. L. R. 192, 8 L. N. 75, 14 R. L. 511 ; 1 Guillouard 192.

(4) 1 Guillouard 193 ; Sirey 72-1-403.

(5) Vincent *v.* Samson, Mag. Court 1894, 13 L. N. 339 ; Dalloz, 55-2-3 ; 1 Guillouard 194.

(6) Vincent *v.* Samson, *supra* ; Art. 1624 C. Code, § 1.

(7) Latreille *v.* Charpentier, C. Ct. 1885, 29 L. C. J. 233 ; 1 Guillouard 194 ; see *supra*, p. 38, note (3).

(8) Mireau *v.* Allan, S. C. 1894, 5 Que. 433.

But the landlord cannot demand the resiliation of the lease if the tenant use the premises, without negligence, for the purpose for which they were leased, although the landlord may be much annoyed and damaged thereby; for instance, where there arises from the storage of goods in a warehouse the smell which such articles usually produce. (1)

The destination of the premises is usually expressly stated in the lease; but in the absence of direct or indirect mention therein of such use, the question will be largely controlled by the nature of their former destination. (2)

The conversion of the leased premises to an illegal and immoral use is a sufficient ground for the resiliation of the lease; for instance, where premises are converted into a *café chantant*, which is frequented by immoral persons—*cafés chantants* being prohibited by the city by-laws in force during the said lease; (3) or where the tenant proves to be a kept mistress (without the previous knowledge of the landlord), although she represented herself in the lease to be a dressmaker. (4)

It has been held in this province that where a tenant leases premises for his own occupancy, and who uses one part as a store and the other for a private residence, he is not considered as having changed the destination of the premises in subletting the part occupied by him as a residence to a club formed of young people who assemble at evenings to discuss, smoke and amuse themselves. (5) This case must be regarded as applicable only to the particular circumstances therein brought forward, for it was not proved that the club in question made any noise or other kind of disturbance, and that, at any rate, it was situated over premises occupied

(1) Joseph *v.* Kinghan, Q. B., Ram. Dig. 610; 17 Duranton 99 note; 3 Duvergier 400.

(2) 3 Duvergier 396; 1 Guillouard 196.

(3) Joseph *v.* St. Germain, S. C. 1894, 5 Que. 61.

(4) Beaudry *v.* Champagne, C. Ct. 1868, 12 L. C. J. 288; Life Association of Scotland *v.* Downie, C. Ct. 1880, 4 L. N. 47; and see 1 Guillouard 197.

(5) Black *v.* Dorval, Q. B. 1885, 29 L. C. J. 326.

as shops. Generally speaking, the above conversion of the destination of premises would be regarded as giving rise to concellation of the lease. (1) It has been held that premises leased for "purposes of concerts, lectures, fairs, bazaars, clubs, societies, public exhibitions and meetings in accordance with law" could not be used for the purpose of holding religious meetings of the Salvation Army, an organization which is obnoxious to a large portion of the inhabitants of the locality; and the building having been injured in consequence, such a use entitled the landlord to obtain rescission of the lease. (2) A shed belonging to a dwelling house may be used for the purpose of stabling a horse therein. (3)

The consequence of using the premises for illegal purposes, or contrary to the evident intent for which they are leased, or of committing waste, is that the landlord can demand, summarily if he wishes, the rescission of the lease. (4) In other respects his recourse is by action for damages. (5) But damages cannot be recovered during the lease for material injury to the premises by the tenant, (6) excepting where such injury is of an irreparable nature, or likely to become so; for instance, the demolition of a wall, or the cutting down of a tree, (7) or allowing an undue quantity of snow to accumulate on the roof. (8)

3. Obligation of the Tenant to Make Certain Lesser Repairs.

The tenant is obliged to make certain lesser repairs which become necessary in the house during his occupancy, (9) but

(1) Aix, 31st Jan., 1833, Sirey, 33-2-485; Troplong 305; Marcadé, No. 1; 4 Aubry et Rau, p. 481; Agnel No. 303; 25 Laurent 259.
(2) Pignolet *v.* Brosseau, M. L. R., 7 Q. B. 77, 21 R. L. 1.
(3) Methot *v.* Jacques, Mag. Ct. 1884, 7 L. N. 384.
(4) Art. 1624, § 1, C. Code.
(5) Art. 1624, § 3, C. Code.
(6) Sirey, 9-1-387; Dalloz, 58-2-86; 1 Guillouard 203; and see 1 Troplong 346; 3 Duvergier 448; Payne *v.* James & Trager, Supreme Ct. Louisiana, 1890, 42 La Ann, 230.
(7) 1 Guillouard 205; 25 Laurent 266; Sirey 60-1 66; Dalloz Rep. vo. *Louage*, No. 279.
(8) Hudson *v.* Russell, 18 R. L. 134; Paré *v.* Coghlin, 20 R. L. 207; Hudson *v.* Baynes, 32 L. C. J. 120.
(9) Art. 1635 C. Code.

he is only obliged to do this by virtue of the fact or presumption that the repairs have become necessary through the use of the premises by him or those under his control, (1) including his sub-tenants. The tenant can clear himself of such presumption by proving that the repairs are rendered necessary by age or by irresistible force. (2) Such repairs are at the charge of the landlord. (3) By "age" is meant the deterioration which results from the ordinary use of the premises, and which cannot be traced to any carelessness on the part of the tenant, however slight. (4) By "irresistible force" is meant those accidental causes, such as where hail breaks the window panes, or a storm destroys the window frames, or where a flood washes away the cement from the underpinning of a house. (5) But the term "irresistible force" must also be construed as including hidden defects in the construction of the premises or in the material used therein. (6)

It has already been stated (7) that stipulations in the lease, charging the tenant with the making of all repairs of whatever nature and from whatever cause arising, are perfectly valid, so long as the repairs necessitated are repairs properly so-called and do not amount to a reconstruction. In the case of doubt, such stipulations must be interpreted in favor of the tenant and against the landlord. (8)

Article 1635 Civil Code enumerates some of the repairs which are at the charge of the tenant, but expressly states that these examples are merely enunciative, and that all others must, if not specified in the lease, be regulated by the usage of the place.

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(1) Arts. 1627, 1628 C. Code, and see *supra*, p. 25.

(2) Arts. 1627, 1636 C. Code.

(3) Arts. 1612, 1636 C. Code.

(4) 2 Guillouard 468; Caen, 8th Aug., 1873, *Rec. de Caen*, 74, p. 33; Sirey 73-2-256.

(5) 2 Guillouard 468, and see Art. 1635.

(6) 2 Guillouard 468; Dalloz Rep. vo. *Louage*, No. 620, 2°.

(7) *Supra*, p. 24.

(8) Art. 1019 C. Code.

The first enumerated in the above article as tenants' repairs are those "to hearths, chimney-backs, chimney casings and grates." Cracks occurring in the chimney-piece or the mantel-piece may result from the heat in the fire-place or from a blow; in each of these cases the repair is at the charge of the tenant. But if the latter can prove that the crack occurred owing to an original defect in the marble or other material, then the repair will be at the charge of the landlord; this results from the application of principles already laid down. (1) The sweeping of the chimney is at the charge of the tenant. (2) And the present by-laws of the City of Montreal provide for a penalty of not more than $40, and in default imprisonment for not more than two months, to be paid by the *occupant* of a house who refuses to pay the fee of the chimney-sweep acting under orders, or who obstructs him in the performance of his duties. The same penalty exists against the occupant, where a chimney becomes on fire, and the occupant of the house had neglected or refused to have his chimney swept. (3).

The second enumeration in Article 1635 of repairs at the charge of the tenant is "plastering of interior walls and ceilings." This presumption is also subject to rebuttal by proof that the plaster has fallen by age, irresistible force, or defective material. (4)

Thirdly, the tenant has also to repair floors, when partially broken, but not when in a state of decay. (5) It would appear that the word "floors" relates to floors of a room, and not of a shed or out-house, or paved yard, which are supposed to be constructed of sufficient strength to bear unusual weight and rough usage. (6)

(1) *Supra*, and see 2 Guillouard 471, commenting on Goupy.

(2) By-law No. 107, sec 98, City of Montreal; see 2 Guillouard 471.

(3) By-law 107, secs. 98, 99, 103, City of Montreal (1893). Fees are 8 cents one-story house; 10 cents for each chimney in two-story house; 13 cents for each chimney in three-story house; 15 cents for each chimney in house of four stories or more; special call to sweep chimney, 25 cents.

(4) See *supra*.

(5) Art. 1635 C. Code.

(6) 2 Guillouard 473 on Goupy; Pothier No. 220, Merlin vo. *Bail*, § 8, 4°; Desgodets, Art. 171, p. 10; 2 Troplong 556 559.

The fourth enumeration of tenant's repairs is "window glass, unless it is broken by hail or other inevitable accident, for which the tenant cannot be holden." (1) But unless the tenant protects his windows during a storm by closing the shutters, if any, he will have to repair the damage done to the glass even by hail. (2)

Fifthly, and lastly, the Code charges the tenant with repairs "to doors, windows, shutters, blinds, partitions, hinges, locks, hasps, and other fastenings." (3) The presumption is that all these were in good condition when the tenant accepted the premises without formal complaint, and that they have since become unfit or broken through his fault. (4)

Other repairs, which the best authorities regard as being at the charge of the tenant, are as follows:—To the wooden canopy over doors and the wainscoting, likewise mirrors; to balconies, window and other bars, trellis-work whether of wire or wood. (5) It is generally agreed in France that the gutter and the pipes which carry the water from the roof are not reparable by the tenant, (6) but we think this rule must be considerably modified in its application to this country.

So far as it is a question of the choking up of the gutter or pipe, it is usual in this country to insert in the lease a clause charging the tenant with the duty of keeping the gutter free from obstructions, the rain pipe being protected with a grating. It is not certain that the landlord is obliged to furnish such a grating; (7) but if he is, and fail to do so, and the pipe becoming choked up, the water overflows, causing damage to the tenant, the former will be liable for the damage only when he has been put in default to put in a grating. (8) But apart

(1) Art. 1635 C. Code.
(2) 2 Troplong 560.
(3) Art. 1635 C. Code.
(4) Pothier, No. 220.
(5) 2 Guillouard 476, 477, on Desgodets annotated by Goupy.
(6) 2 Guillouard 477.
(7) See Holland *v.* de Gaspé, C. R. 1891, M. L. R., 7 S. C. 440.
(8) *Ibid.*

from any special clause in the lease, it is clear that if a roof gutter becomes injured or broken in this country, there is a strong presumption that it has been brought about either by allowing too much snow and ice to accumulate on the roof, or through the negligent chopping of the roof cleaners, and we think its repair should be at the charge of the tenant.

In a climate such as ours, the landlord is obliged to place the water-pipes in such a position, and in such a manner, that they may be fit for their purpose in all seasons. If the lower part of the building through which the pipes pass becomes vacant, the landlord must heat it sufficiently in winter to keep the occupant of the upper portion supplied with water. At all events, the landlord is responsible for the freezing of the water pipes outside of the tenant's immediate premises. (1) If the pipes burst within the premises, the landlord will be liable for damage if the bursting were caused by their bad and insufficient condition. (2) But, doubtless, if they burst within the tenant's premises in winter time, the presumption will be that it arose through the tenant's defective heating of the premises, and he alone will be liable. (3)

The tenant will have to repair injuries to mangers and stalls in the stables caused by the kicking or biting of the horses. (4)

The cleansing of wells and of the vaults of privies is at the charge of the landlord, if there be no stipulation to the contrary. (5)

In the absence of an agreement to the contrary, the tenant is obliged to remove the snow from the roof of the leased premises; (6) and where he neglects to do so, the landlord can re-

(1) Bernard *v.* Coté, C. R. 1892, 2 Que. pp. 84-85; but see Juteau *v.* Magor, S. C. 1892, 2 Que. 428.

(2) Mann *v.* Munro, Q. B. Montreal, September, 1875.

(3) See Juteau *v.* Magor, S. C. 1892, 2 Que. 428.

(4) 2 Guillouard 479.

(5) Art. 1644 C. Code.

(6) Hudson *v.* Baynes, C. Ct. 1888, 32 L. C. J. 120, 18 R. L. 81; Hudson *v.* Russell, C. Ct. 1888, 18 R. L. 134; Paré *v.* Coghlan, C. R. 1890, 20 R. L. 207.

cover from him the cost of having it done, or damages arising through the neglect. (1) But roofs in this country should be sufficiently strong to support a certain quantity of snow, for landlords cannot expect tenants to have their roofs at all times absolutely free therefrom during a heavy storm. (2)

The removal of snow from the sidewalk is made in Montreal, by City By-law No. 47, the duty of the person *owning*, *occupying* or having *charge* of the house, and this must be done before 9 a. m. The duty of removing snow from the roof devolves upon the person *occupying* or having *charge* of the house. (3)

4. Obligation of the Tenant to Pay the Rent and certain other Charges.

The tenant's principal obligation is to pay the rent of the premises. (4) The period at which the rent is to be paid is invariably stated in the lease, but sometimes in a verbal lease, although the annual rental be agreed upon, no stipulation is made as to the terms of payment, or the proof may be insufficient or inadmissible to establish what was intended in that respect. In such case the periods of payment must be governed by local usage. (5) It is a matter of common knowledge that the rent of small houses in our cities is invariably payable monthly ; but as the houses increase in size and rental, the tendency is towards a quarterly payment of the rent, the latter being clearly the limit, for where a person occupies a house by the mere sufferance of the owner, he can be ejected for non-payment of rent only where such non-payment has exceeded a period of three months. (6)

It may be agreed that the rent shall be payable in one amount, or it may be paid in advance. Where a tenant pays

(1) *Ibid.*

(2) Evans *v.* Straubenzie, C. R. 1889, 18 R. L. 216.

(3) See further on this subject *infra*, ch. v, § 1. And see Scotch case, Reid *v.* Baird, 4 Rettie 232.

(4) Art. 1626 C. Code.

(5) 4 Pothier 135 ; 1 Guillouard 215, and see Art. 1642 C. Code.

(6) Art. 1608 C. Code.

one year's rental in advance to his landlord, such a payment is valid as against the latter's vendee, or even his creditors, hypothecary or otherwise, in the event of his insolvency in the course of the year. (1) If a like payment were made for the purpose of defrauding the landlord's creditors, to the knowledge of the tenant, it would not be valid, but the burden of proving the fraud would be upon the creditors. (2) If, however, the tenant paid more than one year's rental in advance, it would be valid against a subsequent purchaser only where the discharge for the payment had been registered, together with a description of the immoveable. (3) And in any event, where the tenant pays rent in advance, whether his lease be registered or not, he will always be liable to pay the rent anew, or be ejected by the purchaser, where the property is sold at judicial sale at the instance of hypothecary or other creditors. (4)

The rent is payable at the domicile of the tenant in the absence of any other place agreed upon in the lease, (5) which means that before the tenant can be considered as having defaulted in the payment of his rent, so that an action will lie by the landlord to recover it, the latter must first demand it from him at his domicile. (6) The consequence to the landlord of taking an action for the rent, without first demanding it, would be that if the tenant brings the money into court

(1) Dupuy *v.* McClanaghan, C. R. 1880, 27 L. C. J. 61; reversing S. C., 24 L. C. J. 243; see remarks of Dorion, C. J., in Baylis *v.* Stanton, 27 L. C. J. at p. 210; and Arts. 1663, 2128, 2129 C. Code.

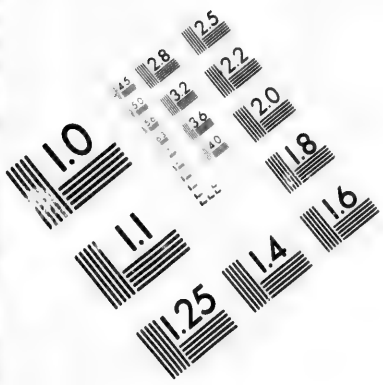
(2) Arts. 1032, 1038, 1203 C. Code; 1 Guillouard 216.

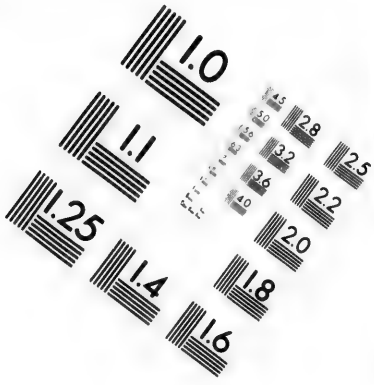
(3) Art. 2129 C. Code.

(4) Desjardins *v.* Gravel, S. C. 1880, 25 L. C. J. 105; Société de Construction Métropolitaine *v.* Commissaires d' Ecoles, etc, Q. B. 1879, 24 L. C. J. 25; Harte *v.* Bourgette, K. B. 1846, 2 R. de L. 33; Bogle *v.* Chinic, Pyke's Rep., p. 20; Dupuy *v.* McClanagan, C. R. 1880, 27 L. C. J. 72; reversing S. C., 24 L. C. J. 243; Mowry *v.* Bowen, C. R. 1884, M. L. R., 3 S. C. 417, following McLaren *v.* Kirkwood, 25 L. C. J. 107.

(5) Pothier, 136; 1 Guillouard 218; and see Art. 1152 C. Code.

(6) Hubert *v.* Dorion, C. Ct., 16 L. C. J. 53; Martineau *v.* Breault, 1889, 12 L. N. 204; Thymeus *v.* Beautrong, S. C. 1879, 9 R. L. 540; Hearn *v.* McGoldrick, C. Ct. 1876, 3 Q. L. R. 368; White *v.* Norman, *ib.*; Donohue *v.* De la Bigne, C. Ct. 1896, 2 Rev. de Jur. 132.





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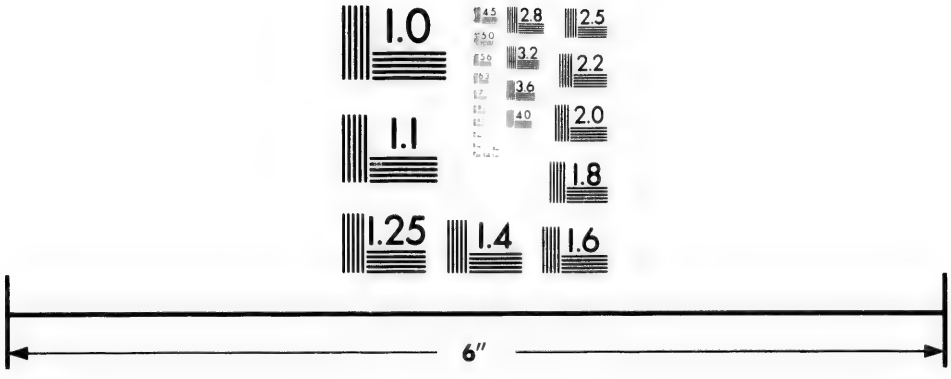

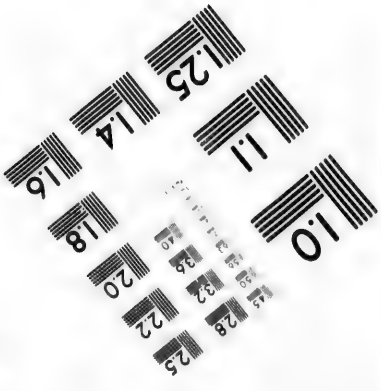

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with him, the landlord will have to pay the costs of the action. (1) No action of damages would lie against the landlord in such case, on the ground of vexatious proceedings, even where the proceedings are commenced by process of attachment. (2)

Leaving a letter, without asking or waiting for a reply, is not a sufficient demand of rent. (3) Where a tenant has his domicile elsewhere than at the leased premises when the rent becomes due, we think the better opinion is that the landlord is not obliged to notify him elsewhere than at those premises; and if they are altogether closed, he is exempted from that obligation. (4)

If rent be paid by the tenant to the wrong party, he cannot be turned out of the premises without an opportunity of paying to the right person. (5)

The tenant has the whole of the day on which the rent becomes due wherein to pay it; an action taken on that day by the landlord to recover the rent is premature. (6)

Interest will begin to run on overdue rent from the date of judicial demand of payment. (7)

Where the landlord, after being notified, fails in his obligation to keep the premises in proper repair, the tenant is not justified in refusing to perform his obligation to pay rent. Under our law, where the landlord has delivered the premises, and the tenant accepts and occupies them, the latter's obligation to pay rent becomes absolute. If he considers that he has a grievance against his landlord, he has a recourse

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(1) *Ibid.*

(2) David *v.* Thomas, Q. B. 1857, 1 L. C. J. 69; and see remarks of Lacoste, C. J., in Scott *v.* McCaffrey, Q. B. 1892, 1 Que. at pp. 125, 126.

(3) Hearn *v.* McGoldrick, C. Ct. Que. 1876, 3 Q. L. R. 368.

(4) Vincent *v.* Samson, C. Ct. 1890, 13 L. N. 339; Donohue *v.* De la Bigne, C. Ct. 1896, 2 Rev. de Jur. 132; and see Tassé *v.* Savard, Mag. Ct. 1889, 13 L. N. 266. *Contra*, 1 Guillouard 219; 27 Demolombe 270.

(5) Baylis *v.* Stanton. Remarks of Ramsay, J., 27 L. C. J. at p. 210.

(6) Donaldson *v.* Charles, Q. B. 1880, 27 L. C. J. 87.

(7) Art. 1077 C. Code; O'Halloran *v.* Kennedy, C. R. 1874, 18 L. C. J. 284; Pothier 138.

by action at law either to have the lease cancelled, with damages, or a reduction of rent. On the one hand the tenant's obligation to pay rent is a liquidated debt proportional to the duration of his occupation, but on the other hand, the landlord's liability for breach of his obligations is an unliquidated debt which can, in the case of dispute, only be liquidated by a judgment of the Court. Therefore, a tenant must, if he has a grievance, either sue his landlord for a cancellation of the lease, or reduction of rent, with damages or for damages alone, or, if sued by the landlord for arrears of rent, he can set up an incidental cross demand for damages; he cannot plead compensation. (1) Where the property leased is destroyed, the tenant is immediately discharged from his obligation to pay rent, (2) even where the property is destroyed by the fault of the tenant. In the latter case the tenant would be liable in damages to the landlord, but the obligation to pay rent always ceases with the destruction of the property leased. (3)

Rent can be compensated like all other debts. (4) Where a tenant is compelled to leave the premises on account of their becoming uninhabitable, and is also allowed damages, he can compensate such damages against rent due by him at the time of his departure. (5)

One of the consequences to the tenant of the non-payment

(1) Lockie *v.* Mullins, S. C. 1886, M. L. R., 2 S.C. 262; Chaperon *v.* Boucher, C. Ct. 1885, 11 Q. L. R., 367; Morin *v.* Hardy, S. C. 1889, 17 R. L. 657; Weippert *v.* Iffland, K. B. 1829, 2 R. de L. 441; Loranger *v.* Perrault, S. C. 1854, Ramsay's Condensed Reports p. 61; Mulhaupt *v.* Enders, Supreme Ct. Louisiana, 38 Louisiana Annual, 744; 25 Laurent 109; Wurtele *v.* Brazier, Q. B. 1818, 2 R. de L. 440; Fyfe *v.* Lavallée, 12 L. N. 147. But see Lemoine *v.* DeBellefeuille, S. C. 1882, 5 L. N. 426; Shuter *v.* Saunders, 3 L. N. 134; Penny *v.* Montreal Herald Printing Co., 27 L. C. J. 83, 4 Aubry et Rau, p. 474; Sirey 48-2-190; Sirey 65-2-199; Cassation, 15th Dec., 1880; Sirey 81-1-170; 1 Guillouard 101 and 222; Boucher *v.* Brault, 15 L. C. J. 117.

(2) Arts. 1659, 1660 C. Code.

(3) See *infra*, Termination of the lease, § 8. Destruction of the premises; Dalloz 68-1-471.

(4) Thymeus *v.* Beautrong, S. C. 1879, 9 R. L. 540.

(5) Fyfe *v.* Lavallée, Mag. Ct. 1889, 12 L. N. 147. See *supra*, p. 80.

of his rent according to the stipulations of the lease, whether verbal or otherwise, is that the landlord can institute an action against him, either in the ordinary course of law or by summary proceedings, according to Art. 887 C. C. P., as amended, to recover possession of the premises leased. (1) If there be no lease, either written or verbal, so that the tenant is occupying by the mere tolerance of the proprietor, he can be ejected only where he has not paid rent for a period exceeding three months. (2) The judge cannot allow the tenant any delay for the payment of rent, and unless he pays the sum due by him, into Court, with interest and costs of suit, before judgment is rendered against him, an order will issue for his expulsion from the premises, if the landlord so concludes. (3) The delay between service of judgment and ejectment is within the discretion of the Court, but is usually three days. (4) For non-payment of rent, the landlord can also join to the action in expulsion a demand for rent with or without an attachment for rent, attachment in recaption, if necessary, and also an ordinary attachment in the hands of the tenant (5) or garnishee. Although a landlord has a privilege for his rent on the effects garnishing the premises leased, (6) he cannot exercise that privilege himself, but must in all cases obtain the process of the Court. (7)

The tenant must be careful to obtain receipts for rent paid, and to preserve them during the whole course of the lease. If he cannot produce a receipt he will only be allowed to bring witnesses to prove the payment, where the amount involved

(1) Art. 1624, § 1 C. Code; Robert *v.* Chateauvert, S. C. 1887, M. L. R., 3 S. C. 214, overruling Pelletier *v.* Lapierre, C. Ct. 1875, 7 R. L. 241.

(2) Arts. 1624 and 1608 C. Code.

(3) Art. 1625 C. Code.

(4) Art 898 C. C. P.

(5) Art. 1624 C. Code; Art. 888 C. C. P.

(6) Art. 1619 C. Code

(7) Gagnon *v.* Hayes, C. Ct. 1864, 15 L. C. R. 170; Leblanc *v.* White, Mag. Ct. 1889, 13 L. N. 69; Cassation, Dalloz, 83-1-338; 1 Guillouard 224; see *supra*, "Privilege of Landlord," p. 49.

is fifty dollars or under, or, if over that amount, where there is some writing which will serve as a basis for the admission of testimony, unless the landlord can be got to admit the payment upon the oath being put to him. (1) If receipts can be produced for the rent of several consecutive years, the better opinion, we think, is that such receipts can serve as a commencement of proof in writing to support the inevitable presumption that the rent was paid for the period anterior to such receipts, and to allow the admission of testimony to that effect. (2)

House rent is prescribed by five years ; (3) but if during that period the tenant makes some acknowledgment of the debt without paying it, this will interrupt the prescription, which will commence to run anew from the date of such acknowledgment. (4)

The cost of the lease and its registration is at the charge of the tenant. (5)

The landlord always retains the *property* in the premises leased, and he has even the enjoyment of it in the form of rental ; (6) it is only just, therefore, that he should support all the real estate taxes thereon, whether ordinary or extraordinary, unless the lease stipulates to the contrary. (7) In the event of such a stipulation in regard to those taxes which it would otherwise be incumbent on the landlord to pay, such taxes assume, so far as the tenant is concerned, the same character as, and go to make up, the rent which the landlord is to get from his tenant for the enjoyment of the thing leased ;

(1) Art. 1233 C. Code: Private receipts for rent or otherwise make *prima facie* evidence of their contents, and the burden of proof is upon the opposite party to disprove them. Baylis *v.* Stanton, Q. B. 1882, 27 L. C. J. 203.

(2) 1 Guillouard 226 ; Colmar, Sirey 4-2-119 ; Cassation, Sirey 37-1 914 ; Bordeaux, Sirey 40-2-222 ; Cassation, Sirey 56-1-421 ; Cassation, *France Judiciaire*, 81-82, p. 527.

(3) Art. 2250 C. Code.

(4) Art. 2227 C. Code.

(5) See Art. 1479 C. Code ; 1 Guillouard 229.

(6) Pothier 211.

(7) Pothier 211 ; 1 Guillouard 231.

they are therefore prescribed by five years, (1) and they can be sued for by the landlord, if in arrears. In this case the tenant cannot refuse to pay the taxes to the landlord because the latter has not paid them to the city or municipality. (2) If the stipulation in the lease, charging the tenant with payment of taxes, is of a wide nature, mentioning specially "all taxes and assessments," this will include special assessments, *e. g.*, such as are imposed for local improvements. (3) But a tenant would not in that case be held liable to pay a special assessment for the widening of a road for which the proprietor had received compensation. (4)

The water tax is not a tax affecting realty, but is a personal tax, and by By-law No. 65, sec. 20, of the City of Montreal, such tax is made payabl e by the occupant or tenant of the premises. The water tax is payable by the tenant to the City *only*, and not to the landlord. (5)

5 Obligation of the Tenant to Preserve the Premises and Restore them in the Condition in which he received them.

1st.—*General Obligations.*

Where a statement has been made between the landlord and the tenant, of the condition of the premises, the latter is obliged to restore them in the condition in which the statement shows them to have been, with the exception of the changes caused by age or irresistible force. (6) If no such

(1) Ouimet *v.* Robillard, S. C. 1881, 5 L. N. 8, 27 L. C. J. 227; Guy *v.* Normandeau, 21 L. C. J. 300, is not to the contrary as the record shows that it was not as tenant, but as co-proprietor, *i. e.*, as *grevé de substitution*, that the party was there held liable, the prescription being held as that of 30 years.

(2) Thivierge *v.* Laurenceville, C. Ct. 1889, 18 R. L. 403; Ouimet *v.* Robillard, *supra*; *Contra*, Maillé *v.* Richer, S. C. 1879, 2 L. N. 414.

(3) Les Ecclésiastiques de St. Sulpice de Montréal *v.* City of Montreal, Supreme Ct. 1889, 16 Can. S. C. R. 399; Pinsonnault *v.* Ramsay, 5 L. C. J. 227; Pinsonnault *v.* Henderson, 5 L. C. J. 338; Berthelet *v.* Muir, 5 L. C. J. 339; Dumas *v.* Viau, 5 L. C. J. 339.

(4) Shaw *v.* Laframboise, Q. B. 1871, 3 R. L. 451.

(5) Donaldson *v.* Charles, Q. B. 1880, 27 L. C. J. 87.

(6) Art. 1632 C. Code.

statement has been made, the tenant is presumed to have received the premises in apparent good condition, and is obliged to restore them in the same condition, saving his right to prove the contrary. (1) And, further, the tenant is liable for injuries and loss which happen to the premises during his enjoyment of them, unless he proves that he is without fault; (2) he is responsible even where the injuries and losses happen from the acts of persons of his family or of his sub-tenants. (3)

If, upon expiration of the lease, the landlord claims that the premises are not delivered up in as good condition as they were received by the tenant, or are delivered in part only, making allowance for ordinary wear and tear, (4) it must first be ascertained whether the deterioration existed at the time the premises were taken over by the tenant, or occurred during his occupation. If a statement of the premises was drawn up at the time of making the lease, this will be easily ascertained; if no such statement exist, and if the deterioration be an apparent one, the burden of proving that the premises were delivered with the derioration existing at the date of the lease is upon the tenant; if the deterioration be a hidden one, such as the existence of bed-bugs in the house, the burden of proving that it arose through the fault of the tenant is upon the landlord. (5) If it be established that the deterioration or loss occurred during the occupancy of the tenant, it must next be ascertained whether it occurred by virtue of the age of the premises, by the fault of the tenant, or from causes beyond his control. The first of these can be determined by an expert examination of the premises, and in order to escape from the presumption of fault against him declared by Art. 1627 C. Code, the tenant must prove that the con-

(1) Art. 1633 *ib.*; 1 Guillouard 246.

(2) Art. 1627 *ib.*

(3) Art. 1628 *ib.*

(4) 25 Laurent 270; 1 Guillouard 242.

(5) Arts. 1632, 1633 C. Code; Caen, 25th Feb., 1871; Dalloz 72-2-150; 1 Guillouard 246.

dition of the premises has arisen through causes beyond his control. (1)

The tenant, it has been said, is responsible for injuries, etc., caused by the persons of his family or of his sub-tenants; (2) this liability must be interpreted as extending to all persons in the house who are under the control of the tenant, such as his wife, children, servants, workmen engaged by him to work about the premises, boarders and guests. (3)

2nd.—*Special Obligation in the Case of Destruction by Fire.*

When loss by fire occurs on the premises leased, there is a legal presumption in favor of the landlord, that it was caused by the fault of the tenant or of the persons for whom he is responsible and unless he proves the contrary he is answerable to the landlord for such loss. (4) Sometimes leases contain a stipulation that the premises shall be delivered over to the landlord at the expiration of the lease in as good order, etc., "accidents by fire excepted." In that case, and more particularly where the tenant undertakes to pay all extra premiums of insurance, which might be charged to the landlord consequent on the nature of the business carried on in the premises by the tenant, the presumption of fault established by Art. 1629 C. Code against the tenant cannot be invoked by the landlord; on the contrary, the burden of proof is upon him to establish fault on the part of the tenant. (5) But apart from such a stipulation in the lease, no mere negative proof will be sufficient to clear the tenant of the legal pre-

(1) Arts. 1627, 1200 C. Code; 25 Laurent 274; 7 Colmet de Santerre, p. 257; 1 Guillouard 237.

(2) Art. 1628 C. Code.

(3) Pothier 193; Domat, liv. 1, tit. 4, Sect. 2, No. 5; 1 Guillouard 247; and see French version of Art. 1628 C. Code, which uses the expression "personnes de sa maison."

(4) Art. 1629 C. Code.

(5) Evans *v.* Skelton, Supreme Ct. 1889, 16 Can. S. C. R. 637, confirming Q. B. 1887, M. L. R., 3 Q. B. 325, 31 L. C. J. 307; overruling de Sola *v.* Stephens, S. C. 1884, 7 L. N. 172, 13 R. L. 472.

sumption against him ; for instance, it is not sufficient for him to show that he acted with the care of a prudent administrator, and that the fire which destroyed the premises could not be accounted for ; he must show how the fire originated, and that it originated without his fault. (1)

The presumption against the tenant, in respect of fire on his premises, exists in favor of the landlord only, and not in favor of the proprietor of a neighboring property who suffers loss by fire, which has originated in the premises occupied by such tenant. (2) But if, in an action against his tenant for damage by fire, the landlord proves affirmatively that the fire arose through the gross negligence of such tenant in the use of dangerous materials, and the neglect of the most simple precautions to guard against the accident, he can recover for damage thereby done to an adjoining property owned by him, as also could a neighboring proprietor if he could make the same proof. (3) The presumption established by Arts. 1629, 1630 C. Code does not arise in favor of the landlord, where the fire arises in other premises leased by his tenant and communicating with those belonging to such landlord. (4)

If there be two or more tenants of separate parts of the same property, each is answerable for loss by fire according to the proportion of his rent to the rent of the whole property, unless it is proved that the fire began in the habitation of one of them, in which case he alone is answerable for

(1) Jamieson *v.* Steele, Supreme Ct. 1878, Cassel's Digest, 2nd edit., p. 466, confirming Q. B. 1876, Ram. Dig. p. 217. See Evans *v.* Skelton, per Taschereau, J., 16 Can. S. C. R. at p. 656 ; Seminary of Quebec *v.* Poitras, S. C. 1870, 1 Q. L. R. 185 ; Bélanger *v.* McCarthy, C. R. 1875, 19 L. C. J. 181; and see 4 Pothier, *Louage*, No. 194 ; 2 Bourjon, *Droit Commun*, p. 47 ; Domat, *Lois Civiles*, p. 185 ; Denisart vo. *Incendie*. It may be remarked that the words "without his fault" include "fortuitous event," as the greater includes the less, and that to prove the former is to prove the latter. (See Art. 1072 C. Code). Vallet, *Obligations du Locataire d'Immeubles en cas d'Incendie*, pp. 98 and 103. In view of these authorities, we think the holding in Labbé *v.* Murphy, Q. B. 1896, 5 Que. 88 (now before the Supreme Court) can scarcely be considered as a good definition of the law. But see Parent *v.* Potvin, S. C. 1895, 1 Rev. de Jurisprudence 387.

(2) Art. 1630 C. Code.

(3) Jamieson *v.* Steele, Supreme Ct. 1878, Cassel's Dig., 2nd edit., p. 466.

(4) Pinsonneault *v.* Gerriken, Q. B. Montreal, June, 1875.

it, or some of them prove that the fire could not have begun with them, in which case they are not answerable. (1)

Where the proprietor also inhabits a part of the house leased by him, the presumption against the tenant is somewhat modified. The landlord must prove that the fire did not originate in his part of the premises, in order to get the benefit of the presumption established by Art. 1629 Civil Code in his favor, and then the presumption only exists for the part actually occupied by the tenant, not for the whole house. To render the tenant liable for damage to the rest of the premises, the burden of proving his negligence would be upon the landlord. (2) The same rule is applicable to an action by a tenant for the same cause, against his subtenants in the same building. (3)

The damages to which a landlord is entitled should cover all losses directly traceable to the fire, (4) such as a sufficient sum to reconstruct the premises on the basis of the value of the property at the date of the fire, and loss of rent. But if the tenant should rebuild at his own expense, allowance must be made for the increased value, if any, of the new building over the old. (5) Where the landlord is insured, the amount due by the insurance company is limited to the actual loss sustained to the *premises* insured, and does not include loss of rental during the period required to rebuild or repair. (6) This is a matter purely between the landlord and the tenant. The insurance company may be subrogated in all the rights of

(1) Art. 1631 C. Code.

(2) Sirey 9-2-314; Sirey 44-2-175; Sirey 56-1-103; Dalloz 55-1-457; Sirey 73-2-69; Dalloz 74-5-318; 1 Troplong 380; 3 Duvergier 425; Marcadé, Art. 1733; 4 Aubry et Rau, § 367; 1 Guillouard 272. Since 1883 the French law on this point has been modified by Statute. The rule only exists where the relation is one of landlord and tenant and not that of joint occupants. Foster *v.* Allis, Q. B. 1871, 16 L. C. J. 113.

(3) 1 Guillouard 272.

(4) Art. 1073 C. Code.

(5) 1 Guillouard 279, 280; Sirey 51-2-129; Sirey 51-2-132; Sirey 70-1-60; Dalloz 74-5-319; 4 Aubry et Rau, § 367; Marcadé, Arts. 1733–1734; Cassation J. P. 1840-2-729.

(6) 1 Guillouard 279; Vallet, *Obligations du Locataire d'Immeubles en cas d'Incendie*, p. 122.

the landlord as regards the actual insurance money paid by them, provided that *at the same time the payment is made*, they are *expressly* subrogated in his rights against the tenant in regard to that sum. (1) If the company should fail to be so subrogated, their recourse against the tenant for damages would exist merely by virtue of Art. 1053 C. Code after having paid the insurance to the insured. (2) The advantage of subrogation in this case is, that the insurers succeed to the special presumption of fault on the part of the tenant provided by Art. 1629 in favor of the landlord, whereas by Art. 1053 the burden of proving fault is upon the insurers. (3)

(1) Cedar Shingle Co. *v.* La Cie. d'Assur. de Rimouski, Q. B. 1893, 2 Que. 379; Arts. 1155-2584 C. Code.
(2) *Ibid.*
(3) *Ibid.*

CHAPTER V.

RIGHTS OF THE TENANT.

1. *Right to enjoy the thing leased.* | 2. *Sub-lease or assignment of the lease.*

1. Right to Enjoy the Thing Leased.

It has already been stated (1) that the lease of real estate is a contract by which the landlord grants to the tenant the mere *enjoyment* of the premises during a certain time, for a rent or price that the latter obliges himself to pay ; also, that the house includes its accessories. But the tenant must use the premises for the purpose for which they were leased, and in a normal manner. Within these limits he will not ultimately be liable to third parties for any damage which they may suffer in consequence of his use of the premises. The landlord, in effect, is obliged to give his tenant a *peaceable* enjoyment of the premises during the continuance of the lease, which would be evaded were the tenant to be plied with actions at law in consequence of his use thereof. (2) The third party injured would, no doubt, have an action against the tenant, but the latter can protect himself by bringing an action in warranty against the landlord. (3) If the tenant's use of the premises has been abusive or negligent, the landlord will not be held responsible therefor. 4)

In a Quebec case the landlord and tenant were sued jointly by the proprietor of a barn which was burnt by sparks from

(1) *Supra* p. 1 ; Art. 1601 C. Code.

(2) Art. 1612 C. Code ; 1 Guillouard 287 ; 25 Laurent 174 ; Cassation, Dalloz 76-1-263. See Muller *v.* Stone, Supreme Ct. Louisiana, 27 La. Ann. 125.

(3) *Ib.* ; Cassation, Dalloz 73-1-294.

(4) *Ib.* ; but see *infra*, p. 94, as to fall of snow from roof. A proprietor is not responsible for damages caused to a neighboring proprietor by explosions in quarrying carried on on his property by his tenant. Vannier *v.* Larche, S. C. 1858, 2 L. C. J. 220.

a steam engine in a tanning factory leased to the tenant. It was proved that there was no defect in the construction of the furnace and the smoke stack. The court held the tenant liable, and dismissed the action so far at it related to the landlord. (1) But so long as the tenant operated the factory in a strictly careful manner, he would probably have a recourse against his landlord for the future, after notifying him that the factory could not be safely operated in its present condition. (2)

In any event, the above principles must be very cautiously applied where the result would be to make the landlord liable to reimburse the tenant for damages demanded by third parties as a consequence of the use of the premises. (3)

The landlord cannot be held liable for the damages resulting from the acts of his tenant by virtue of the principle of law, that every person is responsible for the damage caused by the fault of those who are under his control, (4) the tenant not being considered as under the control of his landlord. (5) Thus, where the tenant of a shop erects an awning, which, being blown down by a storm, seriously injures a passer-by, the latter's recourse is against the tenant only. (6) The landlord's direct liability will occur where injury to third persons arises from a defective construction of the premises or want of repairs, whether the injury occurs to passers-by or to guests of the tenant, or others rightly on the premises. (7) It has

(1) Dufour *v.* Roy, Q. B. 1885, 11 Q. L. R. 192, 8 L. N. 75, 14 R. L. 511.

(2) Cassation, Dalloz 73-1-294; 25 Laurent 174.

(3) See Dalloz 1873-1-294, notes 4 and 5; and see Dufaux *v.* Roy, as reported in 14 R. L. at p. 515.

(4) Art. 1054 C. Code.

(5) Dufaux *v.* Roy, Q. B. 1885, 11 Q. L. R. 192, 8 L. N. 75, 14 R. L. 511.

(6) Brisson *v.* Renaud, S. C. 1888, M. L. R., 4 S. C. 88.

(7) Art. 1055 C. Code; Elliott *v.* Simmons, Q. B. 1890, M. L. R., 6 Q. B. 368; 20 R. L. 666, confirming S. C., M. L. R., 5 S. C. 182. Tait J. in Superior Court stated that he did not think the term "ruin" used in Art. 1055 C. Code was to be restricted to the absolute ruin of a building (p. 185; and see Rancour *v.* Hunt, C. R. 1892, 1 Que. at p. 81, per Andrews J.).

The landlord of a building rented for office purposes is liable to a tenant who was injured by falling into the elevator well through the carelessness of an employee of the landlord who left the elevator door open while at lunch. Stephens *v.* Chaussé, Supreme Ct. 1888, 15 Can. S. C. R. 379.

been held that a landlord is responsible for damages to a member of the tenant's family by a defect in a staircase constructed by a previous tenant. (1)

Where the administration of the sidewalks belongs to the city, town, or village, and if any accident occurs thereon by reason of their slipperiness or an undue accumulation of snow, in winter time, it is proper to sue the city, etc, as being primarily responsible, (2) and as in most of our towns and cities by-laws are extant which render it incumbent upon the person *owning*, *occupying* or *having charge* of the house, to clear the snow from the sidewalk, (3) the city can sue in warranty either one of the above mentioned parties if he be at fault. (4) The law has always been that one remedy open to a municipality condemned in damages was that it could, after paying the damages, sue the person ultimately liable therefor, when grounds existed for so doing. But it is now held that the party sued as primarily responsible for a quasi-delict can, before condemnation, call in the tortfeasor and have him condemned by one and the same judgment. Whether the calling in of the tortfeasor be called an action of warranty or not, it is simply the joinder of two actions *en responsabilité*. (5) In regard to snow or ice which may fall off a roof and injure a passer-by, the city having no right of control over the roof but simply (as provided by By-law No. 47 City of Montreal), the right to punish the occupant who neglects to remove

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(1) Tremblay *v.* Gratton, C. R. 1895, 8 Que. 22.

(2) Grenier *v.* City of Montreal, Q. B. 1876, 21 L. C. J. 296.

(3) See By-Laws of Montreal, No. 47.

(4) City of Montreal *v.* Larose, S. C. 1880, 3 L. N. 406.

(5) Montreal Gas Co. *v.* St. Laurent, Supreme Court 1896, 26 Can. S. C. R. 176; Archibald *v.* Delisle, Supreme Court 1895, 25 Can. S. C. R. at p. 17; Sourdat *Respons*. No. 805. "Il n'est pas nécessaire, pour cela, que l'auteur du dommage figure dans la cause, sauf à la personne civilement responsable à l'y appeler pour le faire condamner par le même jugement à la garantie, s'il y a lieu." (*Ib.*) Guillaume *v.* City of Montreal and City of Montreal *v.* Larose, 3 L. N. 406; Royal Electric Light Co. *v.* Wand, S. C. 1894, 5 Que. 383. But see Corp. de St. Jean *v.* The Atlantic & N.W. Ry., Q. B. 1894, 4 Que. 66; Central Vermont *v.* Cie d'Assurance, Q. B., 1893, 2 Que. 450.

the ice and snow therefrom, is not liable for accidents arising from that cause. (1)

It is a question of some difficulty to determine who is liable in a like case. It is noticeable, in the city of Montreal, that in regard to keeping the sidewalks clear of ice and snow, the city, knowing itself to be primarily responsible for the condition thereof, has expressly enacted in its by-laws, (2) that the duty of keeping them clear devolves not only upon the person occupying or having charge of the house, but upon the owner as well. (3) This enables it to have recourse against the latter by way of warranty. In regard to the section (4) dealing with the removal of snow or ice from the roof, the city, knowing that it is not responsible towards the public for the condition of roofs, having merely a power of regulation over them and not of administration, has not made the owner punishable for any omission to clear the snow therefrom, except where he is himself occupying the house, or has it under his immediate charge. The section referred to merely affects the person "occupying or having under his charge any house, part of a house," etc. Therefore, so far as the City of Montreal is concerned, the landlord of a property leased to and occupied by a tenant is not by any statutory enactment rendered liable to clear the snow or ice from the roof in winter, and in one at least of several cases, it has been expressly decided, on common law grounds, that it is not incumbent upon him to perform this duty as towards the tenant. (5) Where, however, one unbroken roof covers several

(1) Thibault *v.* City of Montreal, S. C. 1894, 5 Que. 45.

(2) No. 47, sec. 15 (1).

(3) See Cassation, 13th Feb., 1834, 26 Journal du Palais 157.

(4) No. 20.

(5) Hudson *v.* Russell, C. Ct. 1888, 18 R. L. 134. The tenant must enjoy the property as a prudent administrator, (Art. 1626 C. Code).
Andrews J. in Rancour *v.* Hunt, C. R. 1892, 1 Que. at p. 81, doubts whether this duty devolves upon the tenant in the absence of proof of any usage to that effect. But the usage would appear to be a well established one in our cities where there are not several tenants under the same roof.

dwellings, or in the case of a building rented for office purposes, the responsibility for the condition of the roof must fall upon the landlord. (1) So much for the relation of the landlord towards the tenant in respect of the roof. Regarding his relation to the public in this respect, the Court of Review at Quebec has decided that Art. 1055 C. Code, which provides that the owner of a building is responsible for the damage caused by its ruin, where it has happened from *want of repairs* or from an original defect in its construction, is applicable to the case under consideration. (2) That this article is susceptible of a much wider interpretation than would appear on its face is evident from the fact that French jurisprudence and doctrine concur in applying its equivalent to the case of the fall of a tree upon an estate, even where the trunk shewed no apparent weakness. (3)

In the City of Quebec, the case is still stronger against the landlord. There, By-law No. 227, sec. 5, renders it incumbent on the *owner*, occupant or tenant, or other person having the charge, care or administration of a house, etc., to remove the snow and ice from the roof. It was pointed out by Andrews, J., delivering the judgment of the Court, that it is true the landlord is not responsible for the tenant's faults of commission, *e. g.*, if the tenant had thrown something from

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(1) See Troplong, *Louage*, No. 335 ; Cassation, Sirey 1835-1-653.

(2) Rancour *v.* Hunt, C. R. 1892, 1 Que. at p. 81, and in Elliott *v.* Simmons, M. L. R., 5 S. C. 182, the interpretation was also extended ; and see 2 Sourdat, 1458. In Rancour *v.* Hunt, Mr. Justice Andrews also laid much stress upon the negligence of having houses constructed in our climate with roofs sloping towards the street. The learned judge remarked : "The position of a proprietor who has a building so constructed that it discharges snow and ice from its roof on to the street, is a most unfavorable one." And it is interesting to note that substantially the same remarks were used in a Scotch case decided by the highest court in Scotland. (Reid *v.* Baird, Court of Session 1876, 4 Rettie, at p. 235 by the Lord Justice-Clerk). The Lord Justice also remarked : "The defense is, that the damage was caused by an unusual and exceptional snowstorm, and no doubt that seems to have been the case, but still snowstorms must be calculated for in building houses in this climate, and it cannot be said that a house is properly built if it will not resist even an exceptional snowstorm."

(3) Paris, 20th Aug., 1877, Sirey 78-2-48 ; Larombière, Art. 1386, No. 10 ; 8 Demolombe *Contrats*, 664 ; Recamier, *Respons.*, p. 177.

the window of the house; (1) but the question here is: "can the landlord get rid of responsibility for the non-performance of a duty originally incumbent on himself by saying that he has transferred that duty to another, who has also failed to perform it?" (2) The Court decided in this case that the proprietor of a house fronting on a public street is responsible for accidents to the public, caused by snow and ice falling from the roof, whether the house be tenanted or not, and the injury caused by such a snowfall being in the nature of a *quasi-délit*, one co-proprietor may be sued alone for the damage, he having the right to call in his co-proprietor if so disposed. (3)

In the city of Quebec a statute (55-56 Vic., ch. 50, sec. 5) imposes the maintenance and repair of street sidewalks on the proprietor of the adjacent lot, and not on the city, therefore an action for damages caused by a defective sidewalk must be brought directly against the proprietor of the adjacent lot. (4)

The tenant must be very guarded in making alterations or improvements to the premises leased by him, where he has not previously obtained the consent of his landlord. The tenant, it is true, must be allowed the peaceable *enjoyment* (5) of the premises, but, on the other hand, the landlord can require him to enjoy them as a prudent administrator, and for the purposes for which they were designed. The matter of making alterations and so-called improvements is often a question of taste, and what the tenant considers an improvement might be highly objectionable to the landlord. The painting

(1) See Dufour *v.* Roy, Q. B. 1885, 11 Q. L. R. 192; Brisson *v.* Renaud, S. C. 1888, M. L. R., 4 S. C. 88.

(2) See Cassation, Ministère Public *v.* Fanière, J. P., 1834-35, p. 157. This case was based upon a by-law enacting that "the *owner* or *tenant* is obliged to daily sweep the sidewalk fronting his premises, etc." The Court held that this obligation was one appertaining to the property itself, and therefore rested ultimately upon the landlord.

(3) 1 Que. S. C. 74.

(4) Seguin *v.* City of Quebec, S. C. 1893, 3 Que. 23.

(5) Arts. 1601, 1612 C. Code.

of the outside of the house by the tenant a conspicuous red is a good example of what the landlord might validly complain of. (1) Doubtless, a tenant could not, if his landlord objected, replace the wall paper, though soiled, with paper of an inferior quality, provided he accepted the premises decorated with such soiled paper. Where premises are not supplied at the time of the lease with gas fixtures or gas pipes of any description, the better opinion is that the tenant may have them put in at his own expense, in localities where gas is supplied, even where the landlord objects on account of the disturbance to the property caused by placing the pipes, etc. (2) For the same reason, where premises are leased for manufacturing purposes, and the lease is silent as to the motive power to be employed, the tenant can install any power in general use, necessary for the industry for the carrying on of which the premises were leased, and for the reception of which they might reasonably be expected to be adapted. (3)

The tenant cannot claim from his landlord reimbursement of his outlay for improvements made without the authorization of the latter and without his agreement to pay therefor. The tenant's only right in regard to such improvements is to remove them, where they are by law susceptible of removal. (4) But where immediate alterations to the machinery on, and leased with, the premises are required to be made by the municipal authorities, the tenant can make them, and

(1) Arguing from Deguire *v.* Marchand, C. R. 1878, 1 L. N. 326; and see as to disfiguring property by barring up windows, etc., Pignolet *v.* Brosseau, Q. B. 1891, M. L. R., 7 Q. B. 77; see also 25 Laurent 175; 1 Guillouard 289.

The placing by a tenant, without the written consent of the landlord, of a partition across the hall of the rented building, so as to be readily removed without injury, is a change that the tenant cannot make under the clause, that he shall make no alterations without the written consent of the landlord. (Kuneman *v.* Boisse, 19 Louisiana Annual, 26. In the absence of such a stipulation the placing of such a partition would be lawful. (*Ib.*)

(2) Sirey 63-2-32; Dalloz 62-2-208; 25 Laurent 255; Agnel 330 and note; 1 Guillouard 290.

(3) Mireau *v.* Allan, S. C. 1894, 5 Que. 433; 25 Laurent 254; Sirey 67-2-289; Dalloz 66-2-227; 1 Guillouard, p. 321.

(4) O'Hagan *v.* St. Pierre, C. Ct. 1887, 16 R. L. 39.

recover therefor from the landlord without previous notice to him. (1)

The tenant has a right to remove before the expiration of the lease, not only as against the landlord, but as against the purchaser, the improvements and additions which he has made to the premises, provided he leaves them in the state in which he has received them; nevertheless, if the improvements or additions be incorporated with the premises with nails, lime or cement, the landlord may retain them on paying the value. (2) Under these conditions a tenant may remove gas and water pipes where he fitted them in, (3) likewise double windows, or mirrors hooked to the wall of a shop to display goods, or an awning over a shop, even where the lease contains a clause that all improvements and additions made during the lease shall become the property of the landlord. (4)

As stated above, the right of the tenant to remove, before the expiration of his lease, the improvements and additions which he has made to the premises, can be exercised not only against his landlord, but even against a third party who has purchased the premises. And it has been held that the right of the tenant to remove a building erected by him, before the expiration of the lease, as against a purchaser of the property, need not be registered, such a right being purely a personal one; (5) and if the purchaser wishes to retain such structure *after the expiration* of the lease, he can only do so by paying the value thereof. (6)

(1) Heney *v.* Smith, C. Ct. 1887, 10 L. N. 333.

(2) Art. 1640 C. Code; Frères des Ecoles Chrétiennes *v.* Hough, C. R. 1893, 3 Que. 471.

(3) Atkinson *v.* Noad, S. C. 1863, 14 L. C. R. 159.

(4) Plamondon *v.* Lefebvre, C. Ct. 1877, 3 Q. L. R. 288; Parent *v.* Gauthier, C. R. 1891, 17 Q. L. R. 60; Vinet *v.* Corbeil, C. Ct. 1887, 15 R. L. 298.

(5) Les Frères, etc., *v.* Hough, C. R. 1893, 3 Que. 471; Duchesneau *v.* Bleau, C. R. 1891, 17 Q. L. R. 349; Rouillard *v.* Duval, C. R., 30th May, 1885, noted at length, 17 Q. L. R. at p. 351; Sangster *v.* Hood, Q. B. 1889, 18 R. L. 40; Miller *v.* Michaud, Louisiana Supreme Ct. 1845, 11 Robinson 225. This question is very much disputed in France (see 1 Guillouard 294 *et seq.*), the doctrine, however, being in favor of the above view.

(6) Les Frères, etc., *v.* Hough, C. R. 1893, 3 Que. 471; and see Sangster *v.* Hood, Q. B. 1889, 18 R. L. 40.

2. Sub-Lease or Assignment of Lease.

The tenant has a right to sublet or to assign his lease, unless there is a stipulation to the contrary. (1) Although there is much controversy in France under a similar provision of law, as to the sense in which the word "assign" (*céder*) is used, yet its interpretation is constant in our jurisprudence as signifying a lease by the principal tenant to another party, of the *whole* of the premises leased by the former, rather than a ***part***, and not a sale of his interest in the lease. (2) The distinction is important, as, in the case of a sale of his lease to another party, the vendor would lose all control over his vendee, and yet still remain liable as formerly to his landlord; whereas, in regarding the assignment as a sub-lease of the whole of the premises rather than a part, the principal tenant can exercise over his sub-tenant all the rights which exist by law between landlord and tenant. (3) The latter view is so much more favorable to, and clearly in the interest of, the principal tenant, that the courts will invariably interpret a deed by a tenant which expressly "assigns" (*céder*) his lease, as being intended to create a sub-lease with the assignee. (4)

If there be a stipulation that the tenant shall not sublet or assign his lease, it may apply to the whole or a part only of the premises, and in either case it is to be strictly observed. (5) It is usual for notarial leases in this Province to contain a clause stipulating that the tenant "will not be allowed to

(1) Art. 1638 C. Code. If there be such a stipulation, it applies to leases by tacit renewal. Vinette *v.* Panneton, M. L. R., 5 S. C. at p. 324.

(2) In Hough *v.* Cowan, Q. B. 1892, 2 Que. at p. 2, Blanchet J., delivering judgment, says: "Dion cède ses meubles et son bail à Déchêne; Déchêne transporte le tout à Francœur & Cie."; and at p. 4: "Ross savait en effet que Francœur & Cie. étaient *sous-locataires* de Dion;" and see elsewhere in same report. Our article of the Code is even more favorable to the above interpretation than the corresponding Article of the Code Napoleon, on account of the omission of the words "*et même de*" before "*céder*." See 25 Laurent 187 *et seq.*; Pothier 280; Domat, Lois Civiles, liv. 1, tit. 4, sect. 1, § 9; Merlin vo. *Sous Location*; Rolland de Villargues vo. *Transport de Bail.*

(3) 1 Guillouard 334.

(4) 1 Guillouard 319; 25 Laurent No. 187 *et seq.*; Rolland de Villargues vo. *Transport de Bail*; Merlin vo. *Sous-Location*; Pothier 280; Domat, *loc cit.*

(5) Art. 1638 C. Code.

transfer his interest in the said lease, or sublet, without the consent in writing of the lessor." The later and better forms of lease contain the word "express" before the word "consent" in the above clause. (1) This is necessary, because our Courts have frequently held that the consent of the landlord may be implied, viz:—where he has acquiesced in the occupation of the premises by the sub-tenant for a long period, or has received the rent directly from him. (2) But even the insertion of the word "express" before "consent in writing" will not always protect the landlord from the imputation of having acquiesced in the sub-lease, for where the landlord receives rent directly from the sub-tenant, and gives him a written receipt therefor, such receipt will be regarded as equivalent to an "express consent in writing" to the sub-lease. (3) Where the prohibition is simply to sublet or assign the lease, this is not always regarded as prohibiting the subletting of part of the premises where the principal tenant still continues to occupy the other part; provided, of course, that the sub-tenant does not change the destination of the part taken by him. (4) But this question depends largely upon the probable intention of the parties. (5) For instance, where the tenant is, at the moment of passing the lease, to the knowledge of the landlord, keeping a boarding house in the very premises for which the lease is being passed, and the tenant states his intention of so continuing to use the premises, a prohibition to such tenant to sublet will not prevent the latter from continuing to rent rooms to lodgers. (6)

(1) Marchand *Formulaire*, p. 167.

(2) Bissonnet *v.* Guerin, C. Ct. 1884, 7 L. N. 368; Cordner *v.* Mitchell, Q. B. 1865, 9 L. C. J. 319; 1 L. C. L. J. 28; Owler *v.* Moreau, Q. B. 1866, 2 L. C. L. J. 84.

(3) Joseph *v.* St. Germain, S. C. 1894, 5 Que. 61; Prefontaine *v.* Fortin, C. R. 1893, 3 Que. 518; and see Hough *v.* Cowan, Q. B. 1892, remarks of Blanchet J. delivering judgment, 2 Que. at p. 4.

(4) Dorion *v.* Baltzley, C. R. 1869, 14 L. C. J. 305; and see remarks of Badgley J. in Owler *v.* Moreau, 2 L. C. L. J. at p. 85 to same effect; Persillier *v.* Moretti, S. C. 1857, 14 L. C. R. 29.

(5) 1 Guillouard 323; 25 Laurent 217, 221, 222; 3 Duvergier 374 and 378; Sirey 6-2-450.

(6) Aimong *v.* Cassidy, S. C. 1888, 16 R. L. 453.

The right to sublet premises, whether wholly or in part, in the face of a stipulation in the lease to the contrary, depends much upon the circumstances. In spite of such a stipulation there is always the possibility that others than the original tenant may exclusively occupy the premises, and be substituted in all such tenant's rights and obligations towards the landlord,—where, for instance, the tenant dies, (1) or he becomes insolvent under an Insolvent Act enacting that the unexpired portion of a lease may be sold by the assignee, (2) no such clause in the lease can prevent the premises from passing into the hands of others who may be very objectionable to the landlord. (3) It is true that prohibitions to sublet must be construed strictly, (4) but our Courts have held that where the prohibition is of a negative kind, viz., where the tenant is permitted to sublet subject to the consent of the landlord, the latter cannot withhold his approval, where the person proposed to be substituted is proved to be as acceptable as the original tenant, and the landlord can give no valid grounds for his objection. (5) A positive prohibition to sublet without the landlord's consent must be strictly observed. (6)

The mere fact of subletting contrary to the terms of the lease does not *ipso facto* cancel the lease ; it can only be voided upon action taken by the landlord. (7) Neither is it always a ground for rescission of the lease. For instance, where the sub-lease has terminated before the institution of the action in rescission, and the landlord has not been injured thereby; (8) and sometimes the Court, instead of

(1) Death does not dissolve a lease (Art. 1661 C. Code).

(2) Wright *v.* Beaudry, S. C. 1872, 2 R. C. 482 ; 1 Guillouard 329 ; 25 Laurent 225 ; 4 Aubry et Rau, p. 492.

(3) *Ibid.*

(4) Art. 1638 C. Code.

(5) Charbonneau *v.* Houle, C. R. 1892, 1 Que. 41 ; David *v.* Richter, S. C. 1882, 12 R. L. 98, 27 L. C. J. 313 ; Sirey 47-2-447 ; Dalloz 47-2-174 ; Sirey 64-2-285.

(6) Mackenzie *v.* Bernard, S. C. 1887, 10 L. N. 113 ; 4 Aubry et Rau, p. 491 ; Sirey 50-2-46 ; Dalloz 82-2-24.

(7) Per Blanchet J. in Hough *v.* Cowan, Q. B. 1892, 2 Que. at p. 3 ; 1 Guillouard 332 ; 25 Laurent 228 ; 4 Aubry et Rau 492.

(8) Gareau *v.* Cinq-Mars, S. C. 1880, 3 L. N. 355.

cancelling the lease, will allow the tenant a certain delay to put matters in the same position in which they were before the sub-lease ; (1) and in a case where the Court will not allow the landlord to withhold his consent to a sub-lease, a tenant who sublets without previously obtaining such consent may, in an action for rescission of the lease by the landlord, ask his consent before judgment upon paying costs. (2) The landlord can provide against all such contingencies by stipulating in the lease that it shall become absolutely void upon the subletting of the premises. (3)

A person to whom leased premises have been sublet contrary to the stipulations of the original lease may be impleaded without adopting the usual forms of procedure, (4) but it is not necessary that he be impleaded at all. (5)

Where there is a prohibition to sublet without the consent of the landlord, and such consent has been obtained, this does not discharge the original tenant from his obligations under the lease. (6) There is no novation in the like case, unless it is *evident* that the landlord intends to discharge the principal tenant from his obligations. (7)

The effect of a sub-lease is to establish a new lease between the principal tenant and the sub-tenant, and the parties thereto will be subject to *all* the rights and obligations relating to the law of landlord and tenant. (8) The principal tenant will still remain, as formerly, subject to the

(1) Vallée *v.* Kennedy, S. C. 1871, 3 R. L. 450.

(2) Charbonneau *v.* Houle, C. R. 1892, 1 Que. 41.

(3) 1 Guillouard 332 ; 25 Laurent 230 ; 4 Aubry et Rau p. 492.

(4) Rhéaume *v.* Panneton, Q. B. 1879, 9 R. L. 594.

(5) Esciot *v.* Lavigne, C. R. 1871, 16 L. C. J. 98, and authorities there cited.

(6) Joseph *v.* St. Germain, S. C. 1894, 5 Que. 61.

(7) Art. 1173 C. Code ; Crédit Foncier Franco Canadien *v.* Young, S. C. 1883, 9 Q. L. R. 317.

(8) 1 Guillouard 334 ; 25 Laurent 198. Where a tenant is sued by his sub-tenant for damages suffered by reason of the premises leased not being wind and water-tight, an action in warranty lies against the lessor by the tenant, although the lease between them contains a clause that the tenant shall not sublet without the consent of the lessor, and the tenant, notwithstanding, sublets without such consent, but afterwards the lessor receives from him the extra premium of insurance caused by such subletting, the sub-tenant being a tavern keeper. Théberge *v.* Hunt, C. Ct. 1861, 11 L. C. R. 179.

terms of the original lease with his landlord. (1) But the landlord has no direct action against the under-tenant, and *vice versâ*. (2) Contracts have effect only between the contracting parties, they cannot affect third parties, and the landlord not being represented in the new contract, there is no privity between him and the under-tenant. (3) Art. 1621 Civil Code gives the landlord a privilege upon the effects of the under-tenant in so far as he is indebted to the principal tenant, and all that Art. 1639 does is to limit the landlord's rights as regards the under-tenant to that amount. But apart from his privilege, the landlord, in the case under consideration, always has this recourse; he can exercise the rights and actions of the principal tenant against the under-tenant when, to his prejudice, the former neglects or refuses to do so. (4)

If the under-tenant pays his rent in advance to the principal tenant, he incurs the risk of subsequent enforcement by the landlord of his rights upon moveables found on the premises; unless the payment were made either in virtue of a stipulation in the lease, or in accordance with the usage of the place. (5)

If the lease is tranferred from the principal tenant to a third party, so as to *expressly* effect a *sale*, then the third party stands towards the landlord in all respects in the place of his vendor, and toward his vendor he is governed by the law of sale and not of lease; he can enforce all his vendor's rights, and is subject to all his obligations after the transfer has been signified to the landlord, (6) but the vendor is not released from his obligations to the landlord.

(1) 1 Guillouard 334; 25 Laurent 198.

(2) The opposite view is taken by the majority of French authors. Messrs. Laurent and Labbé dissenting, 25 Laurent 200; M. Labbé, Sirey 76-2-329 note. M. Laurent's opinion appears to be the one adopted in this province. And see Walker & McVean *v.* Dohan, 39 Louisiana Annual at p. 745; Pandectes Belges vol. 12, p. 276; No. 402.

(3) Art. 1023 C. Code.

(4) Art. 1031 C. Code.

(5) Art. 1639.

(6) Art. 1571 C. Code; 4 Aubry et Rau, p. 493; 1 Guillouard 314 *et seq.*

It is highly advisable that a sub-tenant or transferee of a lease should have the sub-lease or transfer made in notarial form, and have the landlord made a party thereto. Not only do most leases now contain strict prohibitions against subletting without the express consent in writing of the landlord, but even in the absence of such a stipulation, the sub-tenant is always liable to be evicted upon the cancellation of the principal tenant's lease for breach of its obligations. (1) However, where a building has been partly destroyed by fire, but a sub-tenant under an authentic lease wishes to retain his portion of the premises, the principal tenant, having agreed with the landlord that the lease shall be cancelled, (2) cannot evict the sub-tenant who has not failed in his obligations; (3) the sub-tenant can only be evicted upon an action by the landlord to have the whole lease cancelled, for the reason that it would be unprofitable and ruinous to him to have to maintain the sub-lease in view of the extensive destruction of the main premises, which will require to be rebuilt. (4

Where the sub-tenant is evicted on account of breach of obligation on the part of the principal tenant, he cannot claim indemnity from the landlord; (5) but if the sub-tenant's eviction is sought at the instance of the landlord, on the ground that the premises being partly destroyed by fire, it is necessary that the whole shall be rebuilt, the sub-tenant whose premises are not seriously injured, and who wishes to remain, can claim damages for his enforced removal. (6)

The notarial transfer above mentioned usually declares the transferee subject to all the charges and conditions of the

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(1) 4 Aubry et Rau, p. 498; 2 Troplong 544; 2 Larombière, Art. 1165, No. 17; 1 Guillouard 345; Cassation, Sirey 73-1-454 (two cases on same page); Bordeaux, Sirey 45-2-42; Agnel 826.

(2) Art. 1660 C. Code.

(3) Compagnie d'Imprimerie, etc., du Herald *v.* Cochenthaler, S. C. 1882, 11 R. L. 605.

(4) Penny *v.* Montreal Herald Co., S. C. 1883, 27 L. C. J. 83.

(5) Cassation, 21st July, 1873, Sirey 73-1-454.

(6) Penny *v.* Montreal Herald Co., *supra*.

original lease, and to pay the rent to the landlord; he is also declared to be subrogated in all the rights of the transferor resulting from the original lease. The landlord, if agreeable, joins in the transfer, and declares his consent to its execution, but usually expressly declares that the original tenant shall remain as joint security and respondent of the sub-tenant for the payment of the rent and the execution of all the charges and conditions of the original lease which shall remain in full vigor and effect against the transferor.

If premises have been sublet in part, contrary to the terms of the lease, and the landlord sells the property during the course of the sub-lease, it would appear that the sub-tenant, under an annual lease, could not be expelled before the expiration of the year by the purchaser who was aware of the sub-lease, unless the latter had been specially empowered to do so by his deed of acquisition. (1)

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(1) Per Blanchet J. in Hough *v.* Cowan, Q. B. 1892, 2 Que. at p. 4; Owler *v.* Moreau, Q. B. 1866, 2 L. C. L. J. 84. *Contra* Esciot *v.* Lavigne, C. R. 1871, 16 L. C. J. 98.

CHAPTER VI.

TERMINATION OF THE LEASE.

1. In General.

The lease of real estate is a temporary contract having for object the enjoyment of the premises by the tenant, and the enjoyment of the price or rent by the landlord. The lease is extinguished either by the consent of the contracting parties, the expiration of the term, failure by one of the parties to fulfil his obligations, or loss of the object leased. (1)

The contract is not dissolved by the death of the landlord or his tenant. (2) A person is deemed to have stipulated for himself, his heirs and legal representatives, unless the contrary is expressed, *or result from the nature of the contract.* (3) If this law were strictly adhered to, it would sometimes result in great hardship to the tenant's widow or the children who succeed to his estate. For instance, if a professional man

(1) 1655, 1656, 1657, 1658, 1659, C. Code. Where a lease of premises is passed for a stated rental, said rental to commence after the payment of the first instalment of a debt due by the landlord to the tenant, the lease will expire when the amount of the rent for the period of occupation will be sufficient to offset the landlord's debt. Gifford *v.* Harvey, Q. B. 1887, 15 R. L. 323.

(2) Art. 1661 C. Code.

(3) Art. 1030.

were to lease for five years premises away from his residence, to be used for consultative purposes, which premises are expensively furnished :—If he should die during the first year of his lease, his heirs would be bound, provided they accepted the succession, to continue the lease to the end of the five years. Ample security for the rent being on the premises, the landlord would have no object, from a financial point of view, in consenting to a cancellation of the lease. If there was a clause in the lease prohibiting subletting, he might even enforce it. The heirs would therefore be obliged to pay rent on these premises for about four years without deriving probably the slightest benefit. A decision of the Court at Brussels has, on similar grounds, allowed the rescission of the lease on the death of the tenant, where, in fact, premises were leased which would necessarily cease to be adaptable to the purpose for which they were rented, upon the death of the tenant. (1) No less an author than M. Laurent adopts this view. (2)

Apart from the causes above stated, which extinguish the lease, there are others which, while not necessarily extinguishing it, sometimes lead to that result, and always modify its conditions. These circumstances are :—

Insolvency of tenant ;

Sale of the premises leased.

2. Effect of Insolvency of Tenant.

The insolvency of the tenant does not of itself terminate the lease ; (3) its effect is to render immediately due all the rent for the unexpired portion of the lease. (4) Once the abandonment has been made, and the curator has taken possession

(1) Brussels, 2 Dec., 1835 (*Pasicrisie*, 1835-2-349) ; and see Sirey 69-2-251.

(2) 25 Laurent 318.

(3) Rolland *v.* Tiffin, Q. B. 1877, 22 L. C. J. 164 ; Seybold *v.* Evans, Q. B. 1882, Ram. Dig. 354 ; confirming S. C., 4 L. N. 138 ; Sirey 1865-1-201, see extensive note ; 1 Guillouard 354.

(4) Art. 1092 C. Code; Plante *v.* Robitaille, S. C. 1878, 4 Q. L. R. 225 ; and even though the landlord's *gage* be not diminished (Menard *v.* Pelletier, S. C. 1883, 7 L. N. 15 ; Hamilton *v.* Valade, 30th Nov., 1882 ; Jetté, J.).

of the estate, all the effects of the tenant on the premises leased, and the unexpired portion of the lease, become assets of the estate in favor of the creditors. (1) But the landlord is allowed this advantage over ordinary creditors,—he has a privilege over all the goods on the premises leased which the law has made subject to his privilege. (2) In the event of insolvency it is restricted, where the lease is a notarial one, to the whole of the rent due and to become due during the current year, if there remain more than four months to complete the year; and if there remain less than four months to complete the year, to the whole of the rent due and to the rent becoming due during the current year and the whole of the following year. If the lease be not a notarial one, the privilege can only be claimed for three overdue instalments and for the remainder of the current year. (3) What is still due to the landlord after exercising this privilege, he must rank for on the dividend sheet in the same manner as the other chirographic creditors. Unless a compromise is made with the landlord, or other causes render it unnecessary, the unexpired portion of the lease is sold with the other assets. (4) But, if the lease contained a clause prohibiting subletting or the assignment of the lease, this could not be done without the landlord's consent,

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(1) Art. 778 C. C. P. ; *supra*, p. 53.

(2) See chapter on Privilege of Landlord, *supra*, p. 55.

(3) Art. 2005 C. Code, as amended.

Where a property is occupied by a husband (whose wife is separate as to property) by the tolerance of the owner, in the absence of a special agreement the wife cannot be held responsible for rent of the property occupied by the family during the insolvency of the husband. (Harwood *v.* Fowler, C. R. 1889, M. L. R., 7 S. C. 363.)

(4) Where the landlord agrees with the creditors to the cancellation of the insolvent's lease, and that having leased to another party at a superior price, he agrees to pay the surplus to the creditors, this agreement is cancelled upon destruction of the premises by fire, although the landlord repairs and relets at an equally advantageous price. Browne *v.* Pinsonneault, Supreme Ct. 3 Can. S. C. R. 102.

Where the right to the unexpired term of a lease together with the moveables upon the premises were sold under an execution against the lessee, and the leased premises were afterwards destroyed by fire. *Held*—That the purchaser had no right of action against the lessor for the repetition of the rent which had been paid to him on the distribution of the proceeds of the sale. Hayden & Bancroft *v.* The Heirs of H. M. Shiff, Supreme Ct. of Louisiana, 12 La. Ann. 524.

although it was otherwise under a former Insolvent Act. (1) It is, however, recognized here, that if the landlord should succeed in re-letting his property after having exercised his privilege for rent to become due, the creditors would have a right to recover from him a part of the rent. A clause is now frequently inserted in notarial leases, to the effect that, upon the insolvency of the tenant, the lease shall *ipso facto* become null and void after the expiry of the year then current during which such assignment is made, for the remainder of the term thereof, without notice to the assignee or any other person whomsoever. (2) Under such a clause the landlord could only claim from the estate privilege for rent due at the date of the insolvency and to become due at the expiration of the year then current. But if such a clause does not exist, and the landlord wishes to have the lease cancelled for cause, upon the insolvency of the tenant, no claim for future rent would arise, and the landlord could only file his claim against the estate for damages caused by delay in re-letting, as provided for in Art. 1637 C. Code. (3)

The effect of a tenant's insolvency is also to suspend any proceeding by the landlord by way of attachment, attachment for rent or attachment in execution against the effects of his tenant. (4) But this would not interfere with the landlord's continuation of his action so far as it concluded for ejectment of the tenant or for damages, or the preservation of his

(1) Wright *v.* Beaudry, S. C. 1872, 2 R. C. 482. Under Arts. 763 *et seq.* C. C. P., the abandonment does not deprive the insolvent of the property of his goods, but only the possession. Q. B., 2 Que. 588, see *supra*, p. 53.

(2) See as to such a clause made under the Insolvent Act 1875, and voluntary assignment made after the repeal of that Act. (Beaudry *v.* Bond, S. C. 1881, 4 L. N. 227.)

(3) See 1 Guillouard 329. In France the creditors are by the Code, as under our former Insolvent Act, given the express right to assign the lease to a new tenant, and, therefore, a prohibitory clause in the lease as to its assignment is of no effect as against that right. But Mr. Guillouard says that if the landlord wishes to have his desire, as expressed in the lease, respected, he has only to have the lease resiliated and demand damages for re-letting; he cannot realize for any future rent. See Loranger *v.* Clement, C. R., 1 L. N. 326, as to action to resiliate lease during insolvency; and see *supra*, p. 53.

(4) Art. 769 C. C. P.

privilege, (1) and the Court may also allow an attachment to continue in certain other respects, this provision of the law being enacted solely for the protection of the other creditors. (2) The costs of any proceedings by way of attachment which a landlord may continue after he has had knowledge or notice of the insolvency cannot be collocated upon the property of the debtor, the proceeds whereof are distributed in consequence of the abandonment. (3)

Proceedings in attachment being suspended by the insolvency of the tenant, and the curator having the right to take possession of the tenant's effects, which are to be sold in the interest of the creditors, (4) the landlord can realize nothing on his claim for rent until the declaration of the dividend according to Art. *772a* C. C. P.

3. Effect of Alienation of the Premises.

The tenant cannot, by reason of the alienation of the premises, be expelled (5) before the expiration of the lease, by a person who becomes owner of the property under a title derived from the landlord, unless the lease contains a special stipulation to that effect, and be registered. (6) But if the lease be for more than a year, it must be registered in order that it may be invoked against a subsequent purchaser. (7) There is an exception to the above provision of law. Where the leased property is sold at sheriff's sale by

(1) See Loranger *v.* Clement, C. R. 1878, 1 L. N. 326.

(2) Thompson *v.* Kennedy, 16 R. L. 522, M. L. R., 4 S. C. 443; Canadian Mutual Fire Ins. Co. *v.* Blanchard, M. L. R., 2 S. C. 61; St. Jorre *v.* Morin, 10 L. N. 14; Plante *v.* Robitaille, S. C. 1878, 4 Q. L. R. 225.

(3) Art. 769 C. C. P.

(4) Art. 778 C. C. P.

(5) The word "expelled" is used in Art. 1663 of the Code, but this does not exclude the applicability of the article to the case where the tenant has not yet entered into possession, although the lease has been passed. Sirey 27-2-116; Sirey 63-2-87; Dalloz 71-2-78; 4 Aubry et Rau, § 369, text, and note 33, pp. 501, 502; 25 Laurent 393; 1 Guillouard 367.

(6) Art. 1663 C. Code.

(7) Art. 2128 C. Code.

the landlord's hypothecary or other creditors, the tenant is subject to ejectment. (1) But the tenant can partially protect himself against such a consequence. The codifiers have declared that the effect of Art. 2128 C. Code, protecting the tenant under a lease for more than a year, if registered, is to create a charge upon the immoveable, similar to other charges upon immoveables. (2) The tenant, upon hearing that the property is advertised for sale, and no mention being made in the advertisement of his charge thereon, he can file an opposition demanding that the sale be made at the charge of his lease. (3) But in this event, the seizing creditor can demand that the property only be sold subject to such charge, provided that the tenant furnish good and sufficient sureties, within a certain delay, that the property will be sold at a sufficient price to ensure payment of the amount due him. (4)

Under the French Code the protection of the tenant, as against a purchaser of the property, only applies to leases in authentic form, or which have an express date. (5) This distinction does not exist in our corresponding Art. 1663, which is applicable to all leases, even those which are presumed; but, clearly, none but written leases could be respected for more than a year. (6) Where the lease is for more than a year, it is a question as to the date from which such

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(1) Desjardins *v.* Gravel, S. C. 1880, 25 L. C. J. 105; Société de Construction Métropolitaine *v.* Commissaires d'Ecoles, etc., Q. B. 1879, 24 L. C. J. 25; Harte *v.* Bourgette, K. B. 1846, 2 R. de L. 33; Bogle *v.* Chinic, Pyke's Rep., p. 20; Dupuy *v.* McClanaghan, C. R. 1880, 27 L. C. J. 72, reversing S. C., 24 L. C. J. 243; Mowry *v.* Bowen, C. R. 1884, M. L. R., 3 S. C. 417, following McLaren *v.* Kirkwood, 25 L. C. J. 107.

(2) Cod. Rep., Vol. 3, p. 64.

3) Art. 659 C. C. P.

(4) Art. 660 C. C. P.; Dupuy *v.* Bourdeau, S. C. 1881, 6 L. N. 12. *Contra*, Desjardins *v.* Gravel, S. C. 1880, 25 L. C. J. 105; Bogle *v.* Chinic, Q. B. 1810, Pyke's Rep. p. 20.

(5) See Art. 1743 Code Napoleon.

(6) See Art. 2128 C. Code.

year is to be computed. The majority of the authors, and the weightier authorities, decide that it must be computed from the entering into possession by the tenant (1).

If the lease contains a special stipulation, to the effect that the tenant may be expelled, upon the premises being sold by the landlord, notice to quit must be given according to the usual rules in that respect, which are treated of in another part of this work, (2) unless it be otherwise specially agreed. (3) But if the lease contain no such stipulation, and being for more than a year, it is not registered, the prevailing jurisprudence is that the purchaser can evict the tenant without giving him notice to quit, provided a year has expired from the date of the tenant's occupation. (4)

The better opinion is that the position of the purchaser of the property towards the tenant is precisely that which existed between the latter and his landlord—that is to say, the purchaser succeeds to all his vendor's rights and obligations, other than those which are purely personal, in respect of the existing lease of the property. (5) But it is doubtful whether he can exercise a right which was merely optional with his vendor; for instance, the right the latter had to expel a sub-tenant who had rented a part of the premises, contrary to a stipulation in the lease prohibiting sub-letting,

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(1) Troplong, *Transcription*, Nos. 203 and 204; 2 Flandin, *Trans.*, Nos. 1268 and 1269; Dalloz, Rep. Gen. vo. *Transcription*, No. 640; Pont, *Priv. et Hyp.*, No. 369; 29 Laurent, No. 200; Lesserne, *Commentaire*, No. 53; Sellier *Commentaire*, No. 68; McGee *v.* Larochelle, C. R. 1891, 17 Q. L. R. at p. 214.

(2) *Infra*, p. 112.

(3) Art. 1663 C. Code.

(4) McGee *v.* Larochelle, C. R. 1891, 17 Q. L. R. 212; Sirey 3-2-293; Sirey 65-2-293; Sirey 67-2-130; 25 Laurent 389. *Contra*, Pothier, *Louage*, 297; 1 Guillouard 365.

(5) 25 Laurent 392; 7 Colmet de Santerre, p. 278; 1 Guillouard 369; Pothier, *Louage*, 299; Dalloz 71-2-78. A stipulation by the landlord in the lease, that he will not pursue the same occupation as his tenants in the same neighborhood, is a personal obligation, and the purchaser of the property is not bound by it. (Hebert & Damare *v.* Dupaty, Supreme Ct., Louisiana, 1890, 42 La. Ann. 343.)

and where the vendor did not specially transmit to his vendee in the deed of sale the right to exercise this option. (1)

Where a purchaser has acquired the right to expel the tenant before the expiration of his lease, whether by virtue of a clause to that effect in the lease or by virtue of the law, he will be considered as renouncing to such right where he receives the rent for several terms after the date of purchase, and gives receipts without reserving his rights. (2)

Where the tenant is expelled under a stipulation to that effect in the lease, he is not entitled to recover damages, unless the right to do so is expressly reserved in the lease. (3)

When the property sold subject to the right of redemption is taken back by the seller, in the exercise of such right, the lease made by the buyer is thereby terminated, and the tenant has his recourse for damages upon the buyer only. (4)

4. Expiration of the Term agreed upon—Notice to Quit—Delay for Removal, etc.

The lease, if written, terminates of course, and without notice, at the expiration of the term agreed upon. (5) When the term of a lease is uncertain, or the lease is verbal, or presumed, (6) neither of the parties can terminate it without

(1) Hough *v.* Cowan, Q. B. 1892. Remarks of Blanchet J., 2 Que. at pp. 4, 5. *Contra*, Esciot *v.* Lavigne, C. R. 1871, 16 L. C. J. 98.

Where a landlord transfers his rights under a lease, such transfer is not presumed to include a claim of damages against his tenant for deterioration of the property before the transfer of the lease. (Rheaume *vs.* Panneton, Q. B. 1879, 9 R. L. 594.)

On the other hand, where two persons, joint owners of a certain property, leased it, reserving to themselves the right to give notice terminating the lease on their electing to build, and one of the joint owners sold his undivided half of the property, and notice to terminate the lease was given by the purchaser and the owner of the other half—*Held*, that the right to give notice was properly exercised by the purchaser who was substituted in the rights of his vendor. (Mullin *vs.* Archambault, Q. B. 1867, 3 L. C. L. J. 90.)

(2) Commissaires d'Ecoles, etc., *v.* City of Montreal, Q. B. 1879, 24 L. C. J. 25, 2 L. N. 205; 1 Guillouard 375; 25 Laurent 396; Colmet de Santerre, p. 283; Anderson *v.* Comeau, 33 Louisiana Annual Rep., at p. 1121.

(3) Art. 1664 C. Code.

(4) Art. 1665 C. Code.

(5) Art. 1658 C. Code, and see Art. 1138 C. Code.

(6) See Art. 1608 C. Code. A presumed lease cannot be terminated without notice (Jeffrey *v.* Ferns, Q. B. Montreal, June, 1875.)

giving notice to the other, with a delay of three months, if the rent be payable at terms of three or more months; (1) if the rent be payable at terms of less than three months, the delay is to be regulated according to Art. 1642 C. Code. But a distinction must here be pointed out as to the sense in which the term "verbal lease" is interpreted by our Courts. The first test as to when notice should be given is, not whether the lease is written or verbal, but whether the period of its duration is fixed or not. (2) The notice should be in writing. (3) A mere letter addressed to the tenant would usually be of little avail as proof of notice in case of dispute. The only satisfactory way of given notice is to have it served by a bailiff or other person qualified by law, such as a notary.

Now, the object of Art. 1657, read with Art. 1642, is not to regulate the delay of notice according to the terms at which the rent is payable, but rather to make the delay of notice co-extensive with the presumed duration of leases, with this exception, that the maximum delay is of three months. (4) Care has been taken in compiling Art. 1657, after making the delay of notice co-extensive with the duration of the lease, with the exception above stated, to make the whole subject to Art. 1642 as well as Arts. 1608 and 1653, which means two things:—1st, that the notice must be made to conform to the presumed termination of leases mentioned in those articles; and 2nd, that as the duration of a lease, in the absence of any proof as to the *rate* of the rent for a cer-

(1) Gougeon *v.* Yuile, C. R. 1881, 26 L. C. J. 142; Boudreau *v.* Dorais, Q. B. 1880, 10 R. L. 458. Provided there be no agreement as to the termination of the lease.

(2) Jobin *v.* Morisset, S. C. 1846, 1 Rev. de Leg. 383; Boudreau *v.* Dorais, Q. B. 1880, 10 R. L. 458; Huot *v.* Garneau, C. Ct. 1876, 2 Q. L. R. 87; following the opinions of the best French authors; 1 Guillouard 406; 3 Duvergier 485-487; 4 Aubry et Rau, § 369, text, and note 17, p. 498; 25 Laurent 314; Sirey 4 2-118.

(3) Lacroix *v.* Fauteux, Q. B. 1891, 21 R. L. 19; a verbal notice will suffice if the lease be verbal. (Molleur *v.* Favreau, C. R. 1865, 1 L. C. L. J. 28.) As to case of proof of verbal notice, see Saunders *v.* Deom, C. R. 1871, 15 L. C. J. 265.

(4) See Boudreau *v.* Dorais, Q. B., 4th June, 1885, Ram. Dig., p. 409.

tain time, is regulated by usage, (1) so the delays of notice must be determined in a like manner under like circumstances.

From the above statement of the law we get the following results:—

1st. Occupation by sufferance, terminable by three months notice. (2)

2nd. Tacit renewal. If lease renewed was for one year or more, three months' notice required to terminate; (3) if the lease renewed was for three months, two months or one week, notice accordingly.

3rd. If the rent be at the *rate* of so much a year, whether there be any stipulation as to the periods of payment or not, notice of three months is required. (4)

4th. If the rent be at the *rate* of so much a quarter, three months notice to quit is required. (5)

5th. If the rent be at the *rate* of so much per month, the delay of notice must be of one month. (6)

6th. If the rent be at the *rate* of so much a week or day, notice accordingly.

7th. If, a verbal lease being admitted, proof could not be made of the rate of rental or duration, then, according to usage, the lease will be an annual one, terminating on May 1st, (7) and the delay of notice to quit will be of three months. (8)

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(1) Art. 1642 C. Code. As to usage in regard to lease and hire of personal services, see Paquin *v.* City of Hull, C. Ct. 1888, 11 L. N. 355; Reed *v.* Smith, C. R. 1872, 6 Q. L. R. 367.

(2) Brunet *v.* Berthiaume, S. C. 1892, 2 Que. 416.

(3) Webster *v.* Lamontagne, Q. B. 1874, 19 L. C. J. 106; Lacroix *v.* Fauteux, Q. B., 21 R. L. 19; Luke *v.* Wicklife, C. R. 1877, 22 L. C. J. 41; Mowry *v.* Bowen, C. R. 1884, M. L. R., 3 S. C. 417; Lemay *v.* Kandstein, 1896, 2 Rev. de Jur. 421.

(4) Gougeon *v.* Yuile, C. R. 1881, 26 L. C. J. 142. Lemay *v.* Kandstein, *supra.*

(5) Boudreau *v.* Dorais, Q. B. 1880, 10 R. L. 458.

(6) Mathieu *v.* Sylvestre, C. R. 1889, 34 L. C. J. 71, 18 R. L. 266; Bannerman *v.* Thompson, Mag. Ct. 1889, 12 L. N. 146.

(7) Art. 1608 is merely a statutory declaration of the immemorial usage of the Province in this respect. See Brunet *v.* Berthiaume, S. C. 1892, 2 Que. 416.

(8) Art. 1657.

8th. If a house be leased in consideration of personal services to be performed by the tenant, dismissal from service of employer without notice, for cause, will not terminate lease of house; such lease, in absence of stipulation, terminates on 1st May, where notice is given on 1st February. (1) But if the employment be at so much a month, and it was agreed that the lease of the house should be co-extensive with the employment, then one month's notice will terminate the lease. (2)

Notice must always be given so as to bring about the termination in accordance with the presumed termination of the lease. Thus in an annual lease, if the notice be not given on or before the 1st February, or be not given at all, the lease would not terminate on the 1st May, and, being annual, would continue for another year from that date. (3)

It is customary in our cities to require the tenant to notify his landlord upon the latter's demand, not later than the 1st February, or three months before the termination of the lease, whether he intends to renew the lease or not. The reason is that renting time for houses in our cities commences on the 1st February, and between that date and the following 1st May, the renting of the majority of the houses is negotiated. The tenant is obliged, if he does not wish to continue in the premises, after the expiration of his lease, to allow the premises to be visited by prospective tenants. (4) Notarial leases, in conformity with usage, invariably stipulate that the tenant shall allow his premises to be visited, for the purpose of re-letting, during a period of three months before the expiration of the lease, and during reasonable hours.

(1) Brunet *v.* Berthiaume, S. C. 1892, 2 Que. 416; Reid *v.* Smith, C. R. 1872, 6 Q. L. R. 367; but see School Commissioners of St. David *v.* DeVarennes, C. Ct. 1878, 4 Q. L. R. 206; Ville de Maisonneuve *v.* Lapierre, C. R. 1890, M. L. R., 6 S. C. 144.

(2) Hart *v.* O'Brien, C. R. 1866, 2 L. C. L. J. 287.

(3) Luke *v.* Wickliffe, C. R. 1877, 22 L. C. J. 41; Lacroix *v.* Fauteux, Q. B. 1891, 21 R. L. 19; Webster *v.* Lamontagne, Q. B. 1874, 19 L. C. J. 16; Jobin *v.* Morisset, S. C. 1846, 1 R. de. L. 383. See case of Fifle *v.* Bureau, decided at St. Johns by Mr. Justice Charland in 1895, and confirmed in Review.

(4) See *supra*, p. 39.

The tenant is allowed by law the three days following the expiration of his lease (Sundays and holidays are included in that period), for the purposes of removal and of putting the premises in proper condition. (1)

5. Tacit Renewal.

If the tenant remain in possession more than eight days after the expiration of the lease, without any opposition or notice on the part of the landlord, a tacit renewal of the lease takes place for another year, or the term for which such lease was made, if less than a year, and the tenant cannot thereafter leave the premises, or be ejected from them, unless notice has been given, with the delay required by law. (2) When notice has been given, the tenant cannot claim the tacit renewal, although he has continued in possession. (3) There would not be tacit renewal if the remaining on the premises by the tenant after the expiration of the lease arose through the absolute inability of one of the parties, on or before the eighth day, to express his wish in regard to such occupancy, —where, for instance, one of the parties had become demented since the passing of the lease, and no curator or judicial adviser had been appointed to act for him. (4)

The notice mentioned in Art. 1610 of the C. Code is not the same as that usually known as the notice to quit, although subject to the same rules in regard to form and proof; it is merely a notice on the one side or the other that either party does not wish to continue the lease which is about to expire or has expired. Consequently, this notice, even when given after the expiration of the lease, but before the expiration of

(1) Art. 1624, § 2, C. Code; 2 Guillouard at p. 51.

(2) Art. 1609 C. Code.

(3) Art. 1610 C. Code: Adjudication of the premises before 1st February will preclude possibility of tacit renewal after May 1st following. M. L. R., 3 S. C. 417.

(4) Pothier, *Louage*, 345; 3 Duvergier 24; 25 Laurent 336; 1 Guillouard 412; see Delisle *v.* Sauvageau (C. Ct. 1871, 15 L. C. J. 256), where assignee remained in possession after eighth day, but against consent of landlord—*Held*, no reconduction.

the eighth day following, will have the effect of preventing tacit renewal. (1)

The basis of a tacit renewal is a new contract, which is presumed to result from two causes: 1st, the remaining over by the tenant after the expiration of a lease for a definite period; 2nd, the passive consent of the landlord for a period of eight days after such expiration. (2) If either party express his intention not to continue the lease when it expires, this puts an end to any presumption in favor of its continuance, unless revived by the subsequent conduct of both parties. (3)

Thus, if the tenant gave notice that he did not wish to continue the lease after its expiration, the landlord would be entitled to take him at his word; and if, notwithstanding such notice, the tenant remained in possession more than eight days after the termination of the lease, without opposition on the part of the landlord, he could not claim tacit renewal. (4) But if, when the next term of rent becomes due, the question of occupancy comes up, the tenant's continued occupation being regarded as a standing offer of his intention to continue the lease in spite of his former notice, he cannot complain if the landlord signifies his intention of accepting his offer and enforcing the tacit renewal. (5)

On the other hand, if the landlord gave notice that he did not wish to continue the lease, this would necessarily put an end to the possibility of tacit renewal should the tenant remain on the premises more than eight days after the expiration of the lease. (6) Although the tenant did not give the notice

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(1) Hickey *v.* Ewan, C. R. 1893, 6 Que. 29; Joseph *v.* Chouillou, S. C. 1895, 8 Que. 1; 1 Guillouard 416; 17 Duranton 119; 3 Duvergier 502, 503; 2 Troplong 454.

(2) Pothier, *Louage*, 342. There must be no act on the part of the landlord showing a contrary intention. (1 Guillouard 418; 25 Laurent 344.)

(3) 1 Guillouard 417; 4 Aubry et Rau, § 369, text, and note 22, p. 499; 3 Duvergier (continuation of Touillier), 23 and 504; 6 Marcadé, p. 485; 4 Massé et Vergé, § 704, note 17, p. 384; 2 Troplong, *Louage*, 459; Agnel, n. 790.

(4) Art. 1610 C. Code.

(5) Art. 1610 C. Code; Dalloz 73 5-303.

(6) Art. 1609 C. Code.

yet his standing offer of his intention to continue the lease could not avail him to claim its continuance in view of the landlord's express notice to the contrary: a notice which is not waived by his subsequent silence. But the landlord's silence will avail the tenant to this extent: his case will be governed by Art. 1608, and he will be regarded as a tenant by sufferance. (1) If, however, since giving his notice, the landlord has done something which shows unequivocally his change of intention in regard thereto, then, if the tenant has remained on, either party can claim a tacit renewal. (2)

The surety given for the lease does not extend to the obligations arising from the prolongation of it by tacit renewal. (3) If the security given by the tenant personally be other than a hypothecary one, it will remain liable for the rent during the period of the tacit renewal; (4) but if it be a hypothec, it would not extend to the period of renewal, for the tacit renewal being a new lease, the new hypothec could only be created by a new authentic document. (5) And whereas the mere consent of a surety would suffice to continue the suretyship for the period of renewal, (6) yet the above restriction would apply if the security were a hypothec given by such surety.

If the landlord allows the tenant to remain in occupation of the premises on payment of an increased or reduced rental, strictly speaking, there is not tacit renewal of the old lease;

(1) As to tenant by sufferance, see *supra*, p. 1.

(2) 1 Guillouard 417; 4 Aubry et Rau, § 369, text, and note 22, p. 499; 3 Duvergier (continuation of Touillier) 23 and 504; 6 Marcadé, p. 485; 4 Massé et Vergé, § 704, note 17, p. 384; 2 Troplong, *Louage*, 459; Agnel, n. 790.

(3) Art. 1611 C. Code. A person who is surety for a tenant holding under a lease terminable on giving six months notice, cannot exercise the right given in favor of the tenant, if the latter fails to exercise it. (Léonard *v.* Lemieux, 1 L. N. 614.)

(4) Kerr *v.* Hadrill, S. C. 1879, 10 R. L. 192; 4 Pothier, *Louage*, 366.

(5) 4 Pothier, *Louage*, 367.

(6) Domat, Lois Civiles, L. 1, tit. 4, sec. 4, No. 9.

The surety for an absent tenant has no right of action for the resiliation of the lease, on the ground that the premises are out of repair; and cannot bring any such action in the name of the tenant. (O'Donahue *v.* Moisan, S. C. 1865, 1 L. C. L. J. 92.)

(1) but there is a tacit lease, having for basis all the conditions of the old lease, barring the difference in rental and duration, unless it can be proved by the oath of the adverse party that there was a verbal lease, its duration and the terms thereof. (2)

In regard to leases for an uncertain period, or those which result from a presumption of law, it cannot be said that tacit renewal takes place by the occupation from year to year. (3) A lease which is indefinite as to its duration cannot be renewed until it has been terminated in the manner required by law. The law, by presuming annual leases of houses of uncertain duration to terminate on the 1st May, (4) has not thereby definitely fixed the termination of such leases, (5) but has simply provided that if *one* of the parties thereto wishes to terminate it he can only do so at a stated period and bygiving notice at a stated time before such period. (6)

If either of the parties gives notice to terminate such a lease according to law, this notice has the effect of terminating it and preventing it from reviving should the tenant continue to occupy the premises. (7) So long as the landlord remains

(1) Hodgson *v.* Evans, Q. B. 1880, 3 L. N. 300.

(2) Tremblay *v.* Filteau, C. Ct. 1872, 4 R. L. 384; Joseph *v.* Chouillou, S. C. 1895, 8 Que. at p. 3; confirmed in appeal, 30th Oct., 1895; Vinette *v.* Panneton, C. R. 1889, M. L. R., 5 S. C. at p. 324; Dalloz 58-1-453; 92-2 380.

(3) See 17 Duranton, note 1, p. 109; 2 Guillouard 501.

(4) Art. 1642 C. Code; this is also the actual usage in our cities.

(5) This is evidently the meaning of Art. 1608 C. Code, which states that the holding therein mentioned is subject to "tacit renewal." The Article means that the holding is continuous until terminated by the notice of one of the parties as required by Arts. 1657, 1642 C. Code, on Feb. 1st.

(6) 1 Guillouard 407; 17 Duranton 117; 1 Duvergier, *Louage*, 484; 7, Colmet de Santerre, No. 183 *bis* III.; Dalloz, Jur. Gen. vo. *Louage*, No. 594.

(7) 2 Troplong, *Louage*, 456; 6 Marcadé, p. 486. The defendant leased an immoveable from plaintiff for one year and three months, from the 1st February, 1891, at the rate of $1,100 per annum. It was stipulated that the defendant should have the right to continue the lease for a periode of five years after the expiration of the above term, at the rate of $1,200 per annum, by giving a six months' notice to the landlord. The defendant gave no notice, but continued to occupy the premises, and paid the increased rental stipulated.

Held, That in the absence of the six months' notice, the lease only continued by tacit renewal for one year at a time, the increased rental being regarded as the actual value of the use and occupation of the immoveable. Joseph *v.* Chouillou, S. C. 1895, 8 Que. 1. Confirmed in Appeal 30th Oct., 1895, Bossé & Hall *dissentientibus*; and see 1 Guillouard 423, 424; and see Dalloz 50-2-157.

silent and passive after the expiration of the lease, to that extent will the tenant who remains on be regarded as holding by sufferance under Art. 1608 C. Code ; (1) but if the landlord accepts the rental as formerly, and without protest, or does other acts showing unequivocally his intention to recognize a tacit renewal of the conditions of the former lease, the parties will both be subject to the same. (2)

Tacit renewal being regarded as a new lease, if the premises have been rented to several tenants jointly and severally, the fact that one of them remains on the premises after the expiration of the lease will not give rise to tacit renewal in regard to the others. (3)

If a tenant dies, leaving several heirs, and these are in possession of the property leased at the expiration of the lease, and remain so, they must be regarded as having leased the property *per capita*, and not in proportion to the share each has received in the estate of the tenant. The renewal being a new lease, the new contract is made with the heirs, not as representing the person of the former tenant, but acting in their own name, and binding themselves individually as in any other new obligation they might contract. (4)

If the lease contain an express clause, that it shall not, at its expiration, be continued by tacit renewal, this will have the desired effect, unless a new agreement intervene *expressly* or unequivocally declaring a contrary intention. (5)

Tacit renewal can only be terminated by either party giving to the other notice, with the delay required by law. (6) As to how the notice should be given, our Court of Appeal has decided that it must be in writing ; a verbal notice, even if proved, will not suffice. (7)

(1) As to occupation by sufferance see *supra*, p. 1.
(2) Ct. of App., Paris, 5th April, 1850, 61 J. Palais, p. 266, 1st part ; Dalloz 50-2-157 ; 2 Troplong, *Louage*, 457 ; 3 Duvergier (continuation de Touillier) 504.
(3) 1 Guillouard 413 ; Sirey 6-2-59 ; 25 Laurent 335.
(4) 1 Guillouard 414 ; Sirey 31-2-205.
(5) 1 Guillouard 415 ; Pothier, *Louage*, 354.
(6) Art. 1609.
(7) Lacroix *v.* Fauteux, Q. B. 1891, M. L. R., 7 Q. B. 40.

6. Confusion or Consolidation.

Where the qualities of landlord and tenant become united in one person, confusion or consolidation takes places, and the lease is thereby extinguished. (1) Thus, where a landlord whose tenant has become insolvent, and who has filed his privileged claim for unearned rent with the curator of the estate, purchases at the auction sale of the insolvent's assets the unexpired portion of the latter's lease, he loses his right to the privilege, for by the act of purchase the lease became extinguished, and there would thus be no future rent on which to base the privilege. (2)

7. Extinction by Mutual Consent.

A contract of lease can be extinguished by mutual consent like any other contract. But in the measure that it is admittedly advisable that leases of immoveable property should always be in notarial form, so is it equally necessary and advisable that its termination before its period, by mutual consent, should be in the same form.

8. Destruction of the Premises.

If, during the lease, the premises be wholly destroyed by irresistible force or a fortuitous event, (3) the lease is dissolved of course. If they be destroyed in part only, the tenant may, if the circumstances warrant it, obtain the dissolution of the lease. (4) The lease will be immediately extinguished in any

(1) 1 Guillouard 379; 1 Duvergier, *Louage*, 514; Bartels *v.* Creditors, 11 Louisiana Annual 433.

(2) Shepperd *v.* Samuel, S. C., April, 1896, confirmed in Review, 30th June, 1896; Bartels *v.* Creditors, 11 Louisiana Annual 433.

(3) *Casus fortuitus non est sperandus, et nemo tenetur divinare*, 4 Coke 66. This is the sense in which it is used in the French law, 1 Guillouard 387.

(4) Art. 1660 C. Code. Where a party has leased, for a given time, certain described premises, including several houses and lots of ground in the city of New Orleans, and a fire breaks out and destroys the building on a portion of the leased premises, the lessor has the option, under Art. 1667 C. Code of Louisiana, to demand a revocation of the entire lease or a diminution *pro tanto* of the rent. He cannot retain the portion of the leased property unaffected by the fire and have the lease revoked as to that which was destroyed. Penn *v.* Kearney, Blois & Co., Louisiana Supreme Ct., 21 La. Ann. 21.

event, if the premises are for the greater part or totally destroyed; even if the destruction be caused by the act of the tenant, (1) saving the landlord's recourse against the latter for damages. These damages will consist of the value of the property or the part of the property destroyed, the rental which the landlord has been deprived of during reconstruction, and which he will be deprived of during the period required for re-letting the premises. (2)

Where the destruction is caused by an act absolutely beyond the control of either the landlord or his tenant, the landlord must support the consequence, so far as it is a question of cancelling the lease, or allowing instead a reduction of rent; but the cause of destruction being beyond his control, he could not be held liable towards the tenant for damages arising through loss to the latter's personal property or business or from inconvenience. (3) If the destruction, whether total or partial, has arisen through the fault of the landlord, then he is obliged to indemnify the tenant for all direct damages suffered by him, (4) and these are in general the amount of the loss that he has sustained, the profit of which he has been deprived, (5) and which might reasonably have been foreseen at the date of making the lease. (6)

The act of the Government, whether Parliamentary or municipal, is a fortuitous event, even where it is not a question of direct expropriation, but rather one of damages arising out of work being performed on property contiguous to the leased premises. (7)

Art. 1660 of our Code only mentions the cases of total or partial *destruction* of the premises, but, just as our Courts

(1) Dalloz 45-2-172; Dalloz 74-5-319; Sirey 45-2-473; 1 Guillouard 393; Argument from Art. 1659.

(2) Dalloz 45-2-172; Dalloz 74-5-319; Sirey 45-2 473; Art. 1637 C. Code.

(3) Arts. 1660, 1200 C. Code; *nemo casum fortuitum præstat.*

(4) 1 Guillouard 386; Art. 1074 C. Code.

(5) Art. 1073 C. Code.

(6) Art. 1074 C. Code.

(7) Dalloz 59 1-437; Sirey 60-1-453; Dalloz 60-5-226, 64-2-105; Sirey 64-2-200; Dalloz 66-2-243; Sirey 66-2-150; Dalloz 67-2-69; Dalloz 70-2-116; Sirey 71-2-166.

have extended the meaning of Art. 1055 C. Code, which makes the owner of a building liable for the damage caused by its ruin, to the case where snow falls off the roof thereof, and injures a passer-by, (1) so Art. 1660 must be extended to cases where the tenant is prevented from using the premises for the purpose for which they were leased; for instance, where dancing academies are closed by municipal ordinance; serious diminution in the supply of water to a water-power mill; government prohibition to manufacture matches by private industry. (2)

If the premises leased have been *destroyed* either wholly or in part, the responsibility of the landlord and the tenant in such case has just been stated, but neither party can, in the alternative, be compelled to reconstruct; nor can the landlord be so compelled even where he has received insurance for a building destroyed by fire, or has been indemnified by the government where the property has been expropriated. (3)

Destruction must not be confused with damage. If the premises have been merely *damaged* by fortuitous event, the landlord is obliged to repair the damage, (4) but for this the tenant can demand neither resiliation of the lease nor diminution of rent. (5) On the other hand, where the premises have been partly or wholly *destroyed*, the landlord can never be compelled to reconstruct, because there is no express or implied provision in the Code to that effect; (6) the tenant has the equivalent in a reduced rental or cancellation of the lease. (7)

(1) See *supra*, p. 94.

(2) 1 Guillouard 392, and numerous decisions there cited. But the lessee of a mill will not be allowed a reduction of rent on the ground of the total failure of the surrounding crops for several seasons. (Corriveau *v.* Pouliot, Q. B. 1845, 1 R. de L. 184.)

(3) 1 Guillouard 393-394.

(4) Arts. 1612, 1613 C. Code.

(5) Dalloz 69-2-29; Dalloz 79-1-164; 25 Laurent 407.

(6) By Art. 1612 C. Code, the landlord is obliged to "maintain" the premises, but not "reconstruct" them.

(7) Art. 1660.

In the case of partial destruction, if the tenant demands resiliation of the lease, it is discretionary with the Court to determine whether the circumstances call for such a drastic remedy, or whether a reduction of rent will suffice, and to pronounce judgment accordingly. (1) The diminution of rent must be reckoned from the day the tenant has been deprived of his enjoyment. (2)

9. Expropriation.

If the premises be taken in whole for purposes of public utility, the lease is dissolved of course; (3) if taken in part only, the tenant may, as in the case of destruction, obtain a reduction of the rent or dissolution of the lease, (4) but in either case the tenant has no claim for damages against the landlord. (5) It is therefore clear that any indemnity to which a tenant may be entitled by way of damages must be derived from the party expropriating. It is a fundamental principle of our law that no one can be compelled to give up his property, except for purposes of public utility, and in consideration of a just indemnity *previously* paid. (6) And even where the Crown has reserved the right to make public roads on the property granted by it, yet, notwithstanding Art. 906 Municipal Code, and such reservation, a municipality cannot expropriate any of the said land for a road without previously appointing valuators to value it. (7)

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(1) Sirey 72-2-235; Dalloz 77-2-52; 1 Guillouard 397. Even if the tenant concludes simply for resiliation of the lease, there is nothing to prevent the Court from granting less than the conclusion, viz.,—reduction of the rent. (See Bélanger *v.* De Montigny, C. R. 1894, 6 Que. per Jetté J. at p. 526.) And if the lesser demand, *i. e.*, reduction of rent, be raised for the first time in appeal, this will not be regarded as a *new demand.* (Sirey 1872-2-235.)

(2) 1 Guillouard 398.

(3) Art. 1660 C. Code.

(4) *Ib.*

(5) *Ib.*

(6) Art. 407 C. Code.

(7) Corp. de Dorchester *v.* Collet, Q. B. 1884, 10 Q. L. R. 63; King *v.* Corp. d'Irlande, Q. B. 1893, 2 Que. 266.

The right of expropriation in this Province is invariably regulated by statute, whether in favor of the Government, (1) a municipality, (2) town corporation, (3) city or town having a special charter, (4) or corporation. (5) In this Province the right of tenants to indemnity, in the case of expropriation, is generally recognized, even though the statutes make no mention thereof. The words "owner or proprietor," as used in an expropriation act, have no definite meaning. They may refer to owners having either the whole or partial interests. Such words include tenants for terms of years. (6) Under the Railway Acts it has been held that the words "parties..... interested in lands which may suffer damage" include those interested as tenants. (7) Consequently, under the Railway Act, a tenant can enjoin a company from proceeding with its expropriation unless all the formalities required by those Acts have been fulfilled. (8)

But under the Municipal Code and the City charters the context would appear to prohibit the above interpretation to be put upon the words "owner or proprietor." Under the Municipal Code, (9) which does not *expressly* provide for the rights of tenants in case of expropriation, the preliminary title provides that the word "owner" or "proprietor," means every one having the ownership or usufruct of taxable property, or possessing or occupying the same as owner or pro-

(1) Rev. Stats. Can., ch. 39, vol. 1; Stat. Que., 54 Vic., ch. 38.

(2) Arts. 902-924 Mun. Code.

(3) 2 R. S. Q., Arts. 4561-4569.

(4) Charter of Montreal, 52 Vic., ch. 79; 54 Vic., ch. 78, sec. 4.

(5) See Provincial Ry. Act, Arts. 5125-5223, vol. 2, R. S. Q. See Federal Act, 1888, 51 Vic., ch. 29.

(6) Lord Denman C. J., in Lister *v.* Lobley, 7 A. & E. 124; Hopkins *v.* Prov. Ins. Co., 18 U. C. C. P. 74; McDougall *v.* McMillan, 25 U. C. C. P., at p. 97; 57 N. H. 110; 36 N. J. L. 184; 4 N. Y. 66; 26 Pa. 238: Armand *Expr.* p. 36; 2 Christophe *Trav. pub.* No. 380; Dufour, Nos. 12, 262 and 263; Depeyronny et Delemarre, *Expr.* No. 512; Daffrey *Expr.*, p.p. 134-138-139-142.

(7) Bourgoin *v.* Montreal Colonization Ry. Co., Q. B. 1875, 19 L. C. J. 57.

(8) *Ib.*

(9) Art. 19, No. 18, Mun. Code.

prietor, etc. And a similar provision occurs in the Montreal City Charter. But under this latter Act the right of tenants to indemnity has invariably been recognized, and this view was confirmed by the Quebec Legislature in the Amendment to the Charter of 1890, (1) which restricted the rights of tenants in certain cases. (2) So long as there is no express provision of the law which takes away the rights of tenants in the course of expropriation, Art. 407 of the Civil Code must have full effect. (3) It is true that the Privy Council in *Mayor of Montreal* vs. *Drummond* (4) decided that where there is a statute which requires that the compensation payable to any party, by reason of any act of the Council for which they are bound to make compensation, shall be ascertained in the manner prescribed by the statute, this excludes by necessary implication actions of indemnity for damage in respect of such acts. But this decision has never been adhered to in this Province, Judge Ramsay in *Morrison* vs. *Mayor of Montreal* (5) giving sound reasons for not doing so. A statute of this kind merely provides a mode of procedure, and if the corporation desires to have the compensation estimated by commissioners, it must move the Court to appoint them. If it fails to do so, it acquiesces in the ordinary procedure, and is foreclosed from raising the question afterwards.

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(1) 54 Vic., ch. 78, sec. 4; Cité de Montreal *v.* Mathieu, C. R. 1895, 7 Que. 500. Boisseau *v.* The City of Montreal Q. B. 21 June, 1895. This was an appeal from a judgment of the Superior Court, which dismissed an action brought by the appellant for an increase in the indemnity allowed him as a tenant by the award of commissioners for the widening of St Lawrence street. The commissioners allowed the appellant $1.085. The Court of Appeal unanimously maintained this judgment.

Where a tenant has the option of purchasing the premises leased by him, he will not be deprived of his indemnity as a tenant because he has paid part of the purchase price and spent a considerable sum of money on the property. (*ib*)

The promise of sale being conditional in this case, the indemnity for the property taken went to the landlord. (See 24 Laurent 25.)

(2) Sec. 4.

(3) See Montesquieu *Esprit des Lois* Lib 26, ch. 15. Dupras *v.* Corporation of Hochelaga, S. C. 1881, 12 R. L. 35.

(4) 22 L. C. J. 1.

(5) 4 L. N. 25.

(1) A change of level of the street by the municipal authorities constitutes a partial expropriation, and gives the tenant a right to demand a diminution of rent or the resiliation of the lease, and also a demand against the City Corporation for damages. (2)

If the property is acquired by the expropriating party amicably and without recourse to the Act, such party will be in the position of a purchaser of the property, and will have to respect the lease if, being for more than a year, it has been registered (unless the statute specially declares that an amicable expropriation shall have the same effect as a forced one); and in order to divest the tenant of his rights, the expropriating party will be obliged to resort to the regular expropriation proceedings, if the tenant should refuse an amicable transfer of the property. (3)

An opinion appears to have taken root here, to the effect that only notarial and registered leases will be recognized by the commissioners in expropriation. We fail to perceive valid ground for such an opinion. Our Art. 1225 of the Civil Code, which provides that "private writings have no date against third parties but from the time of their registration," etc., goes further than the corresponding article of the Code Napoleon, (4) in providing that the date may nevertheless be established against third persons by legal proof. (5) Also, whereas in France occupancy by sufferance of the owner is not consi-

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(1) *Ib.*; and Grenier *v.* City of Montreal, Q. B. 1880, 3 L. N. 51.

"A défaut de l'accomplissement de ces formalités, le possesseur annuel pouvait sans nul doute se pourvoir en complainte dans l'année de l'entreprise, contre les agents de l'administration. On aurait beau dire que le terrain étant nécessaire à la route, son droit se résout en indemnité; en l'absence des formes voulues pour déposséder un citoyen, même en cas d'ulitilité publique, sa dépossession est un trouble qui doit d'abord être réprimé." (Curasson *des actions possessoires* p. 190.)

(2) Motz *v.* Holiwell, C. R. 1875, 1 Q. L. R. 65; Arts. 1616, 1660 C. Code.

(3) Art. 1663 C. Code; Dalloz Rep. vo. *Expropriation* No. 43; Dalloz 51-3-7; Dalloz 50-3-5. In the matter of the Morgan Ry. Co., Louisiana Supreme Ct. 1880, 32 La. Ann. 371 (Arts. 2697, 2733 Louisiana C. Code are identical with our Arts. 1660, 1663 C. Code).

(4) Art. 1328. See Sirey 38-2-106;

(5) Eastern Townships Bank *v.* Bishop Q. B. 1889, M. L. R. 5 Q. B. 1889.

dered as a lease, under our law it is given *all* the effects of a valid lease, (1) and is estimated tol ast one year, terminating on the 1st May. Such a lease cannot be terminated without three months' notice, and if the tenant were expropriated before the 1st May, he would clearly have a claim for damages. Respecting such occupancy proof by testimony can be made. (2) But in France, and in Belgium where the law is identical with that of the former country, the question, although once controverted, is now outside the range of dispute, and it is held that the common law is not applicable to the case, and that it is sufficient that the lease be not fraudulent. (3)

10. Resolutory Clause.

In the absence of a resolutory clause in the lease, it can only be resiliated for breach of its obligations on the part of the landlord or his tenant, upon a judgment pronouncing the rescission. (4) The various causes giving rise to rescission of the lease have already been stated. It has also been stated in what cases a landlord must be put in default before the tenant demands dissolution of the lease for breach of obligation by the former. (5)

Leases often contain a resolutory condition, generally in favor of the landlord, expressly stipulating that upon the happening of a certain condition the lease shall *ipso facto* terminate,—for instance, for non-payment of rent or the in-

(1) Art. 1608 C. Code.

(2) Art. 1233.

(3) Pandectes Belges, vol. 41. *Expropriation d'utilité publique* (*indemnités*), No. 1003 *et seq*. Dalloz 1861-1-145 extensive note; Sirey 55 2-637; Pallais 55-2-620; Sirey 58-2-111; Paillard-Devilleneuve *Gaz. des Trib.* 19 mai 1854; Cabantous Article in Pallais 54-2-1; Clamargeran *Rev. Prat.* t. 1 p. 80; Daffry *Expr.* p. 358; de Peyronny et Delamarre *Expr.* n. 525; Sabatier *Expr.* p. 335. Were it to be held otherwise, the consequence to the vigilant tenant would be the same, for the change of title in the property expropriated only takes place upon the declaration of the judgment of expropriation, and as the intention to expropriate is always made public beforehand, the tenant can secure himself by at once registering his lease. (See Dalloz 1861-1-145 note at p. 146, citing a decree of the Court of Lyon 7 Aug. 1855.)

(4) Arts. 1138 and 1655 C. Code.

(5) *Supra*, p. 33.

solvency of the tenant. Such a condition only affects the rights of the parties subsequent to the date upon which the landlord declares it to take effect, in consequence of the happening of the condition which it was agreed should give rise to resiliation of the lease. (1) But unless the tenant agrees to accept and act upon the landlord's notice that the lease has terminated, the execution of the resolutory clause must necessarily rest with the Courts; and if, in the action thereon, the landlord's contention is found correct, the tenant will be ejected, and the resolutory clause will be given full effect from the date the landlord first notified the tenant thereunder. (2)

11. Indemnity due the Landlord where the Lease is resiliated for Fault of the Tenant.

In case of ejectment or rescission of the lease for the fault of the tenant, he is obliged to pay the rent up to the time of vacating the premises, and also damages, as well for loss of rent afterwards, during the time necessary for re-letting, as for any other loss resulting from the wrongful act of the tenant. (3)

This must be interpreted to mean that the landlord is entitled to damages based upon what the Court shall estimate to be the *probable* time required to re-let the premises, and not the actual time, (4) unless in the case where the tenant has left the premises, the landlord has succeeded in re-letting before or during the action for resiliation and damages, in which case, if the time is reasonable, the Court will allow the rental for the period the premises were vacant, (5) in addition to the difference between the rent obtainable from the new tenant and what would have been obtained had the former tenant

(1) 25 Laurent 375; Agnel 801; 2 Demolombe, *Contrats* 547; 1 Guillouard 440.

(2) Such a clause is not comminatory; see Richard *v.* Fabrique de Notre Dame de Québec, Q. B. 1854, 5 L. C. R. 3; and Grange *v.* McLennan, Supreme Ct. 1882, 9 Can. S. C. R. at p. 399.

(3) Art. 1637 C. Code.

(4) 2 Guillouard 507.

(5) Beaudry *v.* Boucherie, C. R. 1883, 30 L. C. J. 329.

remained till the expiration of his lease. (1) A recent and very careful judgment has held that three months' rent should be the measure of damages for resiliation of the lease through the fault of the tenant. (2)

12. Eviction of the Landlord.

The landlord's right to the property leased may become extinguished by the superior title of a third party; non-payment of the purchase price, where the deed contains a resolutive condition; nullity of the deed of purchase for error, fraud, violence or incapacity of the vendor; exercise of the right of redemption by the vendor. In the last of these cases the Code expressly declares that the lease is thereby terminated, and the tenant has his recourse for damages upon the buyer only. (3) This is contrary to the rule adopted by the Code Napoleon, Art. 1673; but the commissioners thought that in the case put in our article it would be easy for an intending tenant to ascertain the nature and extent of the title of the ostensible owner of the property, and if he failed to do so, there was no sufficient reason why he should be relieved against his negligence at the expense of the vendor. (4) This is evidently the clue that should be followed, as far as it is applicable, in regard to the other cases,—that is to say, it was clearly the intention of the codifiers to place upon the tenant the burden of discovering the nature of his landlord's title where it is possible, rather than that he should presume it from the latter's apparent ownership. Applying this rule to the somewhat analogous case where the landlord loses his title for non-payment of the purchase price, an event which can only happen under our law where the deed of sale contains a stipulation to that effect, (5) it would be the duty of

(1) Land & Loan Co. *v.* Long, S. C. 1890, 20 R. L. 135. See 2 Guillouard 509–510.

(2) Lemay *v.* Kandstein, 12 June 1896. Pagnuelo J. 2 Rev. de Jur. 421.

(3) Art. 1665 C. Code; and see Art. 1547 C. Code.

(4) Cod. Rep., vol. 2, p. 28.

(5) Art. 1536 C. Code.

the tenant to ascertain, after an inspection of his landlord's title, whether such a condition existed and the purchase price had been paid. If such a condition did exist and the purchase price had not been paid, the prospective tenant would take the lease subject to a risk well known to him.

There is not much difficulty in the way of determining the effect, upon a lease, of eviction of the landlord by a party proving a superior title, and where the landlord having the apparent ownership leases the property in good faith.

Some of the French authors in that case presume the apparent owner to be the mandatory of the actual owner, and as having the power to administrate the property and therefore to pass a lease thereof for a period not exceeding nine years. (1) But many hold a contrary view, (2) and it is to be remarked, that the principal argument used by those who adopt the former view is, that the Code Napoleon expressly so provides in Art. 1673, viz. :—that a vendor with a condition of repurchase must maintain an existing lease when entering into possession of the property in exercise of the condition. This is regarded as the application to a particular article of a general principle of law. (3) As already stated, our law is diametrically the opposite, (4) and in view of this, the argument of those authorities who hold that a lease by a person in possession, without title, need not be maintained by the proprietor who has the title, is irresistibly adaptable to our law.

With the principal lease, naturally falls the sub-lease. (5)

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(1) 1 Guillouard 448 ; 2 Demolombe, *Contrats*, 137 ; 1 Troplong, *Louage*, 98 ; Marcadé, Art. 1713 IV.

(2) 25 Laurent 381.

(3) 1 Troplong, *Louage*, at p. 215 ; 6 Toullier 576 ; 1 Duvergier, *Louage*, 83 ; 1 Guillouard.

(4) *Supra* p. 130 ; Art. 1665 C. Code.

(5) See *supra* p. 103 ; 25 Laurent 386.

CHAPTER VII.

ACTIONS BETWEEN LANDLORD AND TENANT.

1. *Summary procedure.* | 2. *Jurisdiction.*

1. Summary Procedure.

Since the amendment of Art. 887 of the Code of Procedure, (1) all actions arising from the relation of landlord and tenant are subject to summary procedure and governed by Art. 888 *et seq.* C.C.P., should the plaintiff so elect instead of proceeding by ordinary course of law. (2) The delay upon summons is only one intermediate day when the place of service is within a distance of five leagues, with the ordinary extension when the distance is greater. (3) An ejectment suit may be served on Saturday, returnable on Monday. (4)

The defendant is bound to appear on the day fixed by the writ; if he does not, default is recorded against him, and the plaintiff may proceed accordingly. If he appears he is bound to plead within two days after the appearance, in default whereof the plaintiff may proceed *ex parte.* The plaintiff is bound to file his answer within the delay of two days after the filing of the pleas, on pain of being foreclosed. (5)

Any other pleading which may be necessary to complete the issues must be filed on the following juridical day, on pain of foreclosure. (6)

(1) 53 Vic., ch. 61, sec. 1; 54 Vic., ch. 41, sec. 4.
(2) See Art. 899*a* C. C. P. and Arts. 1624, 1641 C. Code.
(3) Arts. 891, 75 C. C. P.
(4) Boulerise *v.* Hebert, S. C. 1879, 2 L. N. 196; Preston *v.* Paxton, Q. B. 1877, 23 L. C. J. 210.
(5) Art. 892 C. C. P.
(6) Art. 893 C. C. P.

As soon as issue is joined, the case may be inscribed upon the roll for proof, for any subsequent juridical day, and the parties proceed to proof on the day appointed and continue on from day to day until the proof is closed on both sides. (1)

Either party's proof may be declared closed as soon as he ceases to produce evidence. (2)

The evidence of witnesses must be taken down in writing in cases before the Superior Court or before the Circuit Court, appealable side, unless the parties agree to take it otherwise; and in the latter case notes of such evidence must be taken down, and filed in the record as forming part thereof, and such notes are considered to be evidence adduced in the case. (3)

When the proof is closed on both sides, the case may be inscribed on the roll for hearing on the merits on the next following juridical day without any notice being required; but if it is inscribed for any other day, notice must be given to the opposite party. (4)

Any party may, either in his declaration or in any other pleading, or by a notice served upon the opposite party, declare his option that the case shall be inscribed at the same term for proof and for final hearing immediately after proof, and in such case the cause cannot afterwards be inscribed otherwise. The party who inscribes a case for proof and final hearing immediately after proof shall, in contested cases, give five clear days' notice of such inscription to the adverse party. (5)

The articles of the Code (89 to 93) relating to judgment by default for non-appearance apply to summary matters between landlord and tenant. (6)

(1) Art. 894 C. C. P.
(2) Art. 895 C. C. P.
(3) Art. 896 C. C. P.
(4) Art. 897 C. C. P.
(5) Art 897*a* C. C. P. as added by 52 Vic., ch. 52, and amended by 53 Vic., ch. 61, sec. 2.
(6) Art. 897*b* C. C. P., as added by 52 Vic., ch. 52.

The clerk of the Circuit Court has, as respects such cases, the same powers as the prothonotary of the Superior Court. (1)

Judgment may be rendered either in term or out of term. It is executory eight days after it is rendered. The delay for ejectment, however, is within the discretion of the Court, three days being the usual allowance. (2) But where the action is taken before the Recorder's Court of Montreal, by reason of the annual value of the property being $100 or less, the tenant may be evicted three days after service of judgment on him. (3)

The delays respecting summons and pleadings also apply to all interventions, oppositions, or other incidental proceedings of the same nature. (4)

The writs of summons, of attachment, of execution and of possession are addressed to the ordinary officers of the Court, like all other writs of the same nature, and by them executed.

The words "summary matters" shall be written or printed at the head of each original, and copy of writ issued under the provisions of this chapter, which provisions shall be interpreted so as not to take away the option of proceeding under the ordinary rules of procedure. (5)

Actions between landlord and tenant, under the summary procedure, may be heard during the vacation between the thirtieth of June and the first of September, (6) including special demands to compel landlords to secure to their tenants the peaceable and undisturbed enjoyment of the premises. (7)

It may be here noted that under Art. 1641 Civil Code,

(1) Art. 897*c* C. C. P., as added by 52 Vic., ch. 52. All provisions inconsistent with the Act 52 Vic., ch. 52, are amended.

(2) Art. 898 C. C. P.

(3) City Charter, 52 Vic., ch. 79, sec. 152.

(4) Art. 899 C. C. P.

(5) Art. 899*a* C. C. P., as amended by 53 Vic., ch. 61, sec. 3.

(6) Art. 890 C. C. P.

(7) Attorney General *v.* Coté, S. C. 1877, 3 Q. L. R. 235.

the tenant is not given any right of action covering cases of the kind just mentioned; they can only be brought under Art. 887 C. C. P. (1) Art. 1641 only gives a tenant right of action in three cases: 1st, to compel the landlord *to make repairs and ameliorations;* 2nd, *to rescind the lease* for failure on the part of the landlord to perform the obligations arising from the lease or devolving upon him by law; 3rd, *to recover damages* for violation of the obligations arising from the lease, or from the relation of landlord and tenant. On the other hand, Article 887 C. C. P., as amended, provides for all actions arising from the relations of landlord and tenant. (2) And it has been held, that an action under Art. 1624 Civil Code, to recover possession of the premises leased, where the tenant continues in possession after the expiration of the lease, may be brought by the landlord under the provisions of Art. 887 C. C. P. This is not a possessory action, but a question between landlord and tenant. (3) Similarly, a tenant may bring an action under the summary procedure to compel the landlord to deliver over the property leased to him. (4) An action of ejectment may be brought by a tenant against a sub-tenant. (5) An action in ejectment will not lie under Art. 887 C. C. P., unless the defendant has occupied under a lease from or by sufferance of the plaintiff. By the term "sufferance" in Article 1608 Civil Code, permission either express or implied is meant. Even at common law, where a person holds property for himself adversely to another, who claims to be the owner, a principal action will not lie against the holder for

(1) *Ib.* at p. 236.

(2) "In an action under the Lessor's & Lessee's Act, where a portion of the demand is for rent payable for a house, and another portion is for rent payable for moveables, the demand for rent is maintainable under the Act as an accessory." Viger *v.* Beliveau, Q. B. 1863, 7 L. C. J. 199; and see Lusignan *v.* Rielle, Q. B. 1888, M. L. R., 4 Q. B. at pp. 269-270.

(3) McBean *v.* Blatchford, Q. B. 1890, M. L. R., 6 Q. B. 273, confirmed in Supreme Court, 20 Can. S. C. R. 269.

(4) Morgan *v.* Dubois, C. R. 1888, 32 L. C. J. 204.

(5) Jaeger *v.* Sauvé, S. C. 1878, 1 L. N. 139.

the value of the use and occupation, which can only be recovered subsidiarily in an action to recover the property itself. (1)

Where a deed contains ostensibly a lease with conditional promise of sale, it is sometimes difficult to determine whether it constitutes *ab initio* a conditional promise of sale, or whether the relation of landlord and tenant does *bonâ fide* exist until the tenant has exercised his option to purchase the property. (2) If the full relation of landlord and tenant exists, so that the landlord can sue in ejectment for non-performance of a condition of the lease, then the action could undoubtedly be by summary procedure. (3) But if the deed contained all the essentials of a conditional promise of sale, although some of the incidents of a lease were present, then the summary procedure would not be applicable. (4) If, where the purchaser of a property recognizes an existing lease thereof, in order to gain possession at the period which he claims the lease expired, his action should be one of ejectment as between landlord and tenant; (5) if he has not recognized the lease, his action should be petitory. (6)

Nor does Art. 1624 provide for all suits which a landlord may take against a tenant. His right of action thereunder lies only, 1st, *to rescind the lease* for cause; 2nd, *to recover possession of the premises* where the lease may be rescinded,

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(1) Parent *v.* Oisel, S. C. 1883, 9 Q. L. R. 135; confirmed in Review, 31st May, 1883, because occupation was not by sufferance; Doran *v.* Duggan, 2 L. C. L. J. 127.

(2) See Evans *v.* Champagne, C. R. 1895, 7 Que. 189, as to interpretation of such a deed; see also 1 Guillouard (Vente) 87; 24 Laurent 24.

(3) See Grange *v.* McLennan, per Dorion C. J., 3 Dorion's Rep. 242, whose dissenting opinion was confirmed by Supreme Court, 9 Can. S. C. R. 385.

(4) Evans *v.* Champagne, *supra*. In Lepine *v.* Permanent Building Society of Jacques Cartier (Q. B. 1876, 20 L. C. J. 300) the head-note states that "a lease for twelve years, containing also a promise of sale, cannot be regarded as a lease giving rise to the summary proceedings provided for by Art. 887 C. C. P." But a perusal of the case will show that there was a stipulation for improvements, and that the lease, being for more than nine years, was regarded as an emphyteusis.

(5) Boudreau *v.* Dorais, Q. B. 1880, 10 R. L. 458.

(6) Desallier *v.* Giguères, Q. B. 1845, 1 R. de L. 388.

and where the tenant continues in possession, against the will of the landlord, more than three days after the expiration of the lease, or where the tenant fails to pay his rent; 3rd, *to recover damages* for violation of the obligations of the lease. None of these would include an injunction to enjoin the tenant from committing waste.

Jurisdiction.

Actions between landlord and tenant are instituted either in the Superior Court or in the Circuit Court, according to the value or the amount of the rent or the amount of the damages alleged. (1) The Recorder's Court of Montreal has concurrent jurisdiction with the Circuit Court, or with any judge of the Superior Court in cases between landlord and tenant where the annual value of the property (which must be in the city) does not exceed $100. (2)

If premises are leased furnished by the landlord, part of the rent being for the house and part for the furniture, the demand for rent or resiliation of the lease may be brought under the summary procedure, the furniture being regarded as an accessory of the house. (3) However, Arts. 887, 888, 890, C. C. P., as amended, did not create a special court for the hearing of cases between landlord and tenant, (4) so that objections to summary procedure must be pleaded by exception to the form. (5)

"Actions between lessor and lessee" says the English version of Art. 888 C. C. P., "are instituted either in the Superior Court or in the Circuit Court, according to the value or the amount of the rent, or the amount of the damages

(1) Art. 888 C. C. P.

(2) Charter of Montreal, 52 Vict., ch. 79, sec. 151. As to evocation, see Desautels *v.* Parker, S. C. 1894, 7 Que. 469.

(3) Viger *v.* Belliveau, Q. B. 1863, 7 L. C. J. 199, and see p. 205; Lusignan *v.* Rielle, Q. B. 1888, M. L. R., 4 Q. B., at p.p. 269, 270.

(4) Lusignan *v.* Rielle, M. L. R., 4 Q. B. 265 and 268; Morgan *v.* Dubois, C. R. 1888, 32 L. C. J. 110; *Contra* Hinds *v.* Donovan, C. R. 1886, 13 Q. L. R. 225.

(5) *Ib.*; Cadieux *v.* Porlier, S. C. 1887, M. L. R., 3 S. C. 453.

alleged." The French version differs by adding the word " claimed "after the word " rent " (*i. e.*, loyer réclamé). The Supreme Court has decided that the French version is the correct one. (1) Thus, if in an action of ejectment there be a demand for rent or for damages, the jurisdiction will be determined by the amount of rent or damages *demanded.* If the action in ejectment concludes for neither of these, it must be determined by the *total* value of the lease (2) less what has been paid thereon. (3) The jurisdiction of the Circuit Court in this case would be regulated by Art. 1054 C. C. P.; but where there is a demand for rent or damages, or value of use and occupation, the Circuit Court has jurisdiction as follows :—whenever the rent claimed, or the annual value claimed for use and occupation, or the amount of damages claimed, does not exceed two hundred dollars. (4)

(1) Blatchford *v.* McBain, 20 Can. S. C. R. 269 ; Voisard *v.* Saunders, Q. B. 1877, 22 L. C. J. 43.

(2) *Ib.* at p. 276 ; per Dorion, C. J., in Voisard *v.* Saunders, Q. B. 1877, 22 L. C. J., at p. 45.

(3) Wood *v.* Varin, S. C. 1886, 15 R. L. 537, M. L. R., 3 S. C. 110 ; Thivierge *v.* Moineau, S. C. 1892, 2 Que. 415 ; McPherson *v.* Gadbois, S. C. 1895, 8 Que. 428.

(4) Art. 1105 C. C. P., as interpreted by Supreme Ct. in Blatchford *v.* McBain *supra,* and per Dorion, C. J., in Voisard *v.* Saunders, *supra.*

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